87-1510
87-1551

SUPREME COURT, U.S.
FILED
MAR 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

OFFICE OF COMMUNICATION OF
THE UNITED CHURCH OF CHRIST,
*Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et. al.*,
*Respondents.*

NATIONAL ASSOCIATION OF BROADCASTERS,
*Petitioner*,

v.

CENTURY COMMUNICATIONS CORP., *et. al.*,
*Respondents.*

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
*Petitioner*,

v.

CENTURY COMMUNICATIONS CORPORATION, *et. al.*,
*Respondents.*

CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS,
AND PUBLIC BROADCASTING SERVICE,
*Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *et. al.*,

*Respondents.*

**On Petitions For Writs Of Certiorari**
**To The United States Court Of Appeals**
**For The District Of Columbia Circuit**

## PETITIONERS' APPENDIX

[Counsel For Individual Petitioners Listed On Inside Front Cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

*Of Counsel*:
ANDREW J. SCHWARTZMAN
Media Access Project
2000 M Street, N.W.
Washington, D.C. 20036

HENRY GELLER*
DONNA LAMPERT
DANIEL R. OHLBAUM
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7360

*Counsel for Petitioner Office of Communication of The United Church of Christ*

*Of Counsel*:
HENRY L. BAUMANN
BENJAMIN F.P. IVINS
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

MICHAEL S. HORNE*
STEVEN F. REICH
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20004
(202) 662-6000

*Counsel for Petitioner National Association of Broadcasters*

J. LAURENT SCHARFF*
JAMES M. SMITH
ROBERT J. AAMOTH
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566

*Counsel for Petitioner Association of Independent Television Stations, Inc.*

PAULA A. JAMESON
NANCY H. HENDRY*
PUBLIC BROADCASTING SERVICE
1320 Braddock Place
Alexandria, Virginia 22314
(703) 739-5000

*Counsel for Petitioner Public Broadcasting Service*

PAUL E. SYMCZAK
SUSAN DILLON*
CORPORATION FOR PUBLIC BROADCASTING
1111 - 16th Street, N.W.
Washington, D.C. 20036
(202) 955-5288

*Counsel for Petitioner Corporation for Public Broadcasting*

BARYN S. FUTA*
MARTHA MALKIN ZORNOW
NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS
1818 N Street, N.W.
Washington, D.C. 20036
(202) 887-1700

*Counsel for Petitioner National Association of Public Television Stations*

**Counsel of Record*

## TABLE OF CONTENTS


| | Page |
|---|---|
| APPENDIX | 1a |
| Opinion of the United States Court of Appeals for the District of Columbia Circuit | 1a |
| Supplemental Order of the Court of Appeals of January 29,1988 | 29a |
| Report and Order of the Federal Communications Commission | 32a |
| Memorandum Opinion and Order of the Federal Communications Commission denying reconsideration | 205a |
| Judgment of the Court of Appeals | 331a |

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 86-1683

CENTURY COMMUNICATIONS CORPORATION, et al.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

INDEPENDENT TELEVISION STATIONS, INC.,
SPANISH INTERNATIONAL COMMUNICATIONS CORP.,
UNIVISION, INC.,
THE NATIONAL ASSOCIATION OF BROADCASTERS,
LINCOLN BROADCASTING CO.,
NATIONAL CABLE TELEVISION ASSOCIATION, et al.,
OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,
CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL ASSOCIATION OF PUBLIC TELEVISION,
PUBLIC BROADCASTING SERVICE,
NATIONAL BROADCASTING CO., INC.,
SPANISH INTERNATIONAL COMMUNICATIONS CORP.,
INTERVENORS

---

No. 87-1280

RICHARD S. LEGHORN, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

CORPORATION FOR PUBLIC BROADCASTING, et al., INTERVENORS

---

No. 87-1301

HUBBARD BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

CORPORATION FOR PUBLIC BROADCASTING, et al., INTERVENORS

---

Petitions for Review of Orders of the Federal Communications Commission

---

Argued October 22, 1987

Decided December 11, 1987

*John P. Cole, Jr.*, for joint petitioners, Century Communications Corp., et al. *David M. Silverman* also en-

tered an appearance for joint petitioners, Century Communications Corp., et al.

*David G. Rozzelle*, with whom *Marvin Rosenberg* and *Barry Lambergman* were on the brief for petitioner, Hubbard Broadcasting, Inc.

*James L. Quarles, III* was on the brief for petitioner, Richard S. Leghorn.

*Daniel M. Armstrong*, Associate General Counsel, Federal Communications Commission, with whom *Diane S. Killroy*, General Counsel, *Gregory M. Christopher* and *C. Grey Pash*, Counsel, Federal Communications Commission were on the brief for respondent. *Robert B. Nicholson* and *Laura Heiser*, Attorneys, Department of Justice also entered appearances for respondent.

*Henry Geller*, with whom *Donna Lampert* and *Andrew Schwartzman* were on the brief for intervenor, United Church of Christ.

*Michael S. Horne*, with whom *J. Laurent Scharff*, *James M. Smith* and *Henry L. Baumann* were on the brief for intervenors, National Association of Broadcasters and Independent Television Stations, Inc. *Julian L. Shepard* and *Molly Pauker* also entered appearances for intervenor, National Association of Broadcasters.

*Arthur Pankopf*, *Susan Dillon*, *Baryn S. Futa*, *Martha M. Zornow*, *Paula A. Jameson* and *Nancy H. Hendry* were on the brief for intervenors, The Corporation for Public Broadcasting, et al.

*Norman P. Leventhal*, *Raul R. Rodriquez*, *Sally A. Buckman*, and *Richard F. Swift* were on the joint brief for intervenors, Spanish International Communications Corporation, National Independent Television Committee and Univision, Inc. *Judith Whittaker* was on the brief for intervenor, Spanish International Communications Corporation. *Richard E. Wiley* and *John C. Quale* also

entered appearances for intervenor, Spanish International Communications Corporation.

*Michael D. Berg* entered an appearance for intervenor, Lincoln Broadcasting Company.

*Jay E. Ricks* entered an appearance for intervenor, National Cable Television Association, Inc., et al.

Before: WALD, *Chief Judge*, MIKVA, *Circuit Judge*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Chief Judge* WALD.

WALD, *Chief Judge*: Two years ago, in *Quincy Cable TV, Inc.* v. *Federal Communications Commission*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub. nom. National Association of Broadcasters* v. *Quincy Cable TV, Inc.*, 106 S. Ct. 2889 (1986), we struck down as violative of the first amendment the FCC's "must-carry" rules. Those rules required cable television operators, upon request and within the limits of their channel capacity, to transmit to their subscribers every over-the-air television broadcast signal that was "significantly viewed in the community" or otherwise considered "local" under the Commission's rules. *See Quincy Cable TV*, 768 F.2d at 1437. Today, we revisit this distinctive corner of first amendment jurisprudence, to evaluate the constitutional validity of the scaled-down must-carry rules adopted by the FCC following our decision in *Quincy Cable TV*. Although the FCC has eliminated the more extreme demands of its initial set of regulations, its arguments in this case leave us unconvinced that the new must-carry rules are necessary to advance any substantial governmental interest, so as to justify an incidental infringement of speech under the test set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). Accordingly, we invalidate as incompatible with the first amendment this latest incarnation of the FCC's must-carry rules.

## I. FACTS

Since the mid-1960's, when the nascent cable television industry began to loom as a threat to ordinary broadcast television, the Federal Communications Commission has labored to protect the local broadcast media through regulation of the cable industry. The Commission's objective in these endeavors

> was not merely to protect an established industry from the encroachment of an upstart young competitor, although such a result was clearly the byproduct of the regulatory posture that developed. Rather, the Commission took the position that without the power to regulate cable it could not discharge its statutory obligation to provide for "fair, efficient, and equitable" distribution of service among "the several States and communities." If permitted to grow unfettered, the Commission feared, cable might well supplant ordinary broadcast television. A necessary consequence of such displacement would be to undermine the FCC's mandate to allocate the broadcast spectrum in a manner that best served the public interest. In particular, if an unregulated, unlicensed cable industry were to threaten the economic viability of broadcast television, the Commission would be powerless to effect what it saw (and continues to see) as one of its cardinal objectives: the development of a "system of [free] local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.'"

*Quincy Cable TV*, 768 F.2d at 1439 (citations and footnote omitted). *See also United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) (approving FCC regulation of cable as within the agency's authority so long as its actions are "reasonably ancillary" to its regulation of broadcast television); *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 F.C.C. Rcd 864 (1986) (hereinafter "*Report and Order*"), *re-*

*consid. denied*, 2 F.C.C. Rcd 3593 (hereinafter, "*Recon. Order*"), at ¶¶ 1-29 (tracing history of cable regulation).[1]

Must-carry rules in various forms have been major tools in this campaign to protect local broadcasting from cable. The FCC first introduced such rules in 1962, when it sought to impose a must-carry requirement as a condition for granting an application to construct a microwave system to transmit distant signals to a rural cable system. *See Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 357 U.S. 951 (1963); *see also Quincy Cable TV*, 768 F.2d at 1440 n.11. In time, the FCC developed a broader must-carry regime, generally requiring cable operators, "upon request, to carry any broadcast signal considered local under the Commission's complex formula." *Quincy Cable TV*, 768 F.2d at 1440. The philosophy behind these rules was

> to assure that the advent of cable technology not undermine the financial viability of free, community-oriented television. If cable were to "drive out television broadcasting service . . . the public as a whole would lose far more—in free service, in service to outlying areas, and in local service to outlying areas, and in local service with local control and selection of programs—than it would gain." The must-carry

[1] Rather than retrace the ground covered in *Quincy Cable TV*, we refer the reader at this juncture to the detailed and comprehensive history of early cable regulation provided in Judge Wright's opinion in that case. *See* 768 F.2d at 1438-45. Other useful history appears in *Southwestern Cable Co., supra*, 392 U.S. at 161-67; United States v. Midwest Video Corp., 406 U.S. 649 (1972) (holding that rule requiring cable operators to originate local programming fell within FCC's statutory jurisdiction); FCC v. Midwest Video Corp., 440 U.S. 689 (1979) (striking down as beyond the FCC's jurisdiction rules requiring cable operators to make channels available for local access); and Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (holding state regulation of alcoholic beverage advertising on cable television systems to be preempted by Communications Act of 1934).

> rules, together with a comprehensive body of related regulations, would channel the development of the nascent cable industry to limit the risks it might pose to conventional broadcasting, "society's chosen instrument for the provisions of video services."

*Id.* (citations omitted); *see generally id.* at 1440-43 (describing, in considerably greater detail, the rationale for the pre-*Quincy Cable TV* must-carry rules).

In 1985, this circuit faced for the first time the question whether the broad must-carry rules which had been in existence for nearly two decades were in harmony with the first amendment. Judge Wright's opinion for a unanimous panel in *Quincy Cable TV* held that they were not. As a threshold matter, we observed that our first amendment review of regulations burdening cable television was not governed by those cases, such as *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) and *FCC* v. *League of Women Voters of California*, 468 U.S. 364 (1984), upholding regulations on broadcast television. In reaching that conclusion, we noted "the Supreme Court's oft-repeated suggestion that the First Amendment tolerates far more intrusive regulation of broadcasters than of other media precisely because of the inescapable physical limitations on the number of voices that can simultaneously be carried over the electromagnetic spectrum." 768 F.2d at 1448. Wire-carried media like cable, of course, have no such limitations, and thus we found the "scarcity rationale" that the Supreme Court has used to justify broadcast television regulations to offer no succor to those seeking to establish the constitutional validity of cable television regulations. *Id.* at 1448-50.

*Quincy Cable TV* did not, however, establish the precise degree of first amendment protection enjoyed by cable operators. Although our opinion noted that some

parallels existed between the must-carry regulations and regulations impinging on editorial discretion that had been invalidated in the past, *see Quincy Cable TV*, 768 F.2d at 1452 (citing *Miami Herald Co.* v. *Tornillo*, 418 U.S. 241 (1974)), it pointedly declined to "definitively decide" whether cable operators enjoy the heightened protection accruing to newspapers or whether the must-carry regulations were more appropriately evaluated under the test, set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968). *See Quincy Cable TV*, 768 F.2d at 1454. Rather, we concluded that the must-carry rules would fail even the *O'Brien* test's requirement of a substantial governmental interest furthered by means no greater than are essential to the furtherance of that interest.

The reasons for our invalidation of the 1985 must-carry rules under the *O'Brien* test were twofold. First, we concluded that the Commission had not adequately substantiated its assertion that a substantial governmental interest existed. In *Quincy Cable TV* we stated that, even accepting the view that the preservation of free local television was an important regulatory goal, our review of the FCC's reports and regulations suggested that the problem the sweeping must-carry rules purported to prevent—the destruction of free, local television—was merely a "fanciful threat," unsubstantiated by the record or by two decades of experience with cable TV. *Id.* at 1457. In general, we noted, "the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms." *Id.* at 1454. Second, even if the interest had been deemed substantial, the broadly-drafted must-carry rules represented a fatally overinclusive response to the problem. We observed in this vein that the rules indiscriminately protected every local broadcaster, regardless of whether it was in fact threatened, and regardless of the quantity of local service available in the community and the degree to which the cable operator in question already carried local outlets.

*Id.* at 1459-62. We did, however, note that our decision in no way foreclosed the Commission from adopting new must-carry rules consonant with the *O'Brien* test. *Id.* at 1463.

In the aftermath of *Quincy Cable TV*, the FCC immediately suspended enforcement of the must-carry rules. Four months later, it announced its intention to undertake rulemaking proceedings, *see Notice of Inquiry and Notice of Proposed Rulemaking*, 50 Fed. Reg. 48232 (1985), and eventually, in November 1986, 16 months after *Quincy Cable TV* had been handed down, the agency released a new, more limited set of must-carry rules designed to accommodate *Quincy Cable TV's* concerns. *See Report & Order.* In the decision to promulgate these new rules, the Commission took note of the many comments, submitted primarily but not exclusively by broadcasting interests, arguing that some form of FCC intervention remained necessary to protect local broadcasting. *See Report & Order* at ¶¶ 36-51; *see also id.* at ¶¶ 52-57 (describing comments, primarily from cable operators, arguing that the reinstitution of must-carry was unnecessary and undesirable).

The most salient feature of the new rules was that the Commission substantially altered its stated justification for imposing must-carry rules at all. No longer did the Commission argue, as it had prior to the *Quincy Cable TV* decision, that the rules were needed for the indefinite future to ensure viewer access to local broadcast stations. Rather, the Commission now argued that must-carry rules were needed to guarantee such access during a shorter-term transition period during which viewers could become accustomed to an existing and inexpensive but largely unknown piece of equipment known as the "input-selector device."

Such devices, if hooked up to a television, allow viewers at any given time to select, simply by flicking a switch, between shows offered by their cable system and broad-

cast television shows offered off-the-air. These devices, the most common of which is known in the cable industry as an "A/B switch," are about the size of a standard light-switch, and work by being hooked up to a roof-top, attic or television-top antenna. According to a study cited by the Commission in its report explaining the new must-carry rules, the cost of buying such a switch is approximately $7.50, and the cost of buying an outdoor antenna to go with it is approximately $50. *See* Joint Appendix ("J.A.") at 240-42 (cited at *Report & Order* at ¶ 124). Outdoor antennas are generally the more expensive of the three types of antennas.

The Commission estimated that it would take approximately five years for the public to become acclimated to the existence of these switches, and accordingly, its interim rules should be in place for that same five years. *See* 47 C.F.R. § 76.64 (stating that rules remain in force until January 15, 1992); *see also Report & Order* at ¶ 138. At that point, the need for ongoing must-carry rules to ensure viewer access to local broadcast stations would be obviated. *See Report & Order* at ¶ 163 ("once cable subscribers become accustomed to using off-the-air reception on an equal basis with cable service, then cable systems no longer will have an artificial ability to limit their subscribers' access to over-the-air broadcast signals"); *see also id.* at ¶ 138 ("While we have found that short-term must carry regulations are necessary in order to ensure that broadcasting remains a competitive alternative source of programming in the interim period, the record clearly supports no more extensive regulatory program than that which we are adopting").

Because the Commission envisioned these switches as guaranteeing effective viewer choice between local and cable shows, it ultimately added to the new must-carry regime the requirement that cable systems offer subscribers, for pay, input-selector devices that could be hooked up to their TVs. *See* 47 C.F.R. § 76.66; *see also*

*Report & Order* at ¶ 140; *Recon. Order* at ¶¶ 80-94 (sketching input-selector requirements and amending earlier regulations so as not to require cable operators to install such devices for free or at cost). It did so over the reservations of some broadcasting concerns, who viewed the input-selector devices as less protective than must-carry rules. *See Report & Order* at ¶¶ 45-47 (noting that "broadcasting interests" did not regard the A/B switch as an efficacious way of protecting local broadcasting). The Commission, observing that relatively few consumers knew about the switch-and-antenna mechanism and noting that the long history of must-carry rules had created a public "misperception" that "broadcast signals will always be available as part of their basic cable service," *see Report & Order* at ¶¶ 121-22, also promised to require cable operators to educate the viewing public about the availability of the switch-and-antenna mechanism. *See, e.g., Report & Order* at ¶¶ 1, 136.

In addition to thus offering a new and more limited justification for must-carry rules, the Commission also substantially limited the sweep of the new rules in a number of respects. It set forth limits on how many channels a cable carrier must devote to must-carry: carriers with 20 channels or less were not required to carry any must-carry stations; carriers with between 21 and 26 stations could be required to carry up to 7 channels of must-carry signals; and carriers with 27 or more channels could be required to devote up to 25% of their system to must-carry signals. *See* 47 C.F.R. § 76.56; *see also Report & Order* at ¶¶ 150-52. It also limited the pool of potential must-carry channels to those satisfying a "viewing standard" generally demonstrating a minimum viewership of the channel in question. *See* 47 C.F.R. § 76.5(d)1(ii); 47 C.F.R. § 76.55 (stating that a broadcast station qualifies for inclusion in must-carry pool if it demonstrates that it attains at least an average share of total viewing hours of at least 2 percent and a net

weekly circulation of 5 percent in noncable households in the county where the cable system is located); *see also Report & Order* at ¶¶ 145-46. The Commission also authorized cable operators to refuse to carry more than one station affiliated with the same commercial network. *See Report & Order* at ¶ 153. Finally, the Commission limited the number of noncommercial stations required to be carried, stating that when the cable system had fewer than 54 channels and an eligible noncommercial station or translater existed, the cable operator must devote at least one channel to a noncommercial station; and that when the cable system had 54 or more stations, it must devote two must-carry channels to such endeavors. *See* 47 C.F.R. § 76.56.

Constitutional and statutory challenges to these new must-carry rules were lodged shortly after their promulgation by an array of cable operators and public interest group. Petitioner Century Comumnications Corp., joined by 13 other cable operators (hereinafter "Joint Petitioners"), protests the must-carry rules as violative of the first amendment of the Constitution, as a taking of property without just compensation in violation of the fifth amendment, and as a measure not authorized by the FCC's statutory jurisdiction and hence *ultra vires*. Petitioner Richard Leghorn, a former cable system operator and presently an investor in the cable industry, challenges the rules on first amendment grounds. Petitioner Hubbard Broadcasting, Inc., a broadcasting concern, assails the failure of the new rules to afford must-carry rights to commercial broadcast translator stations as arbitrary and capricious and therefore violative of the Administrative Procedure Act ("APA"). Intervenor Association of Independent Television Stations argues that the must-carry rules are inconsistent with the Commission's statutory charter to protect adequately needy local stations. Intervenor the United Church of Christ challenges the regulations as arbitrary and capricious in a number of respects. Three other intervenors, the Na-

tional Independent Television Committee, Spanish International Communications Corp., and Univision, Inc., target the viewing standard provision of the new must-carry rules as a content-based regulation giving preference to "popular" over "unpopular" speech and therefore violative of the first amendment; these groups also contend that this requirement is an arbitrary and capricious measure adopted in violation of the APA.

The FCC, in response, defends the must-carry rules as based on a satisfactory administrative record and as consonant with the first and fifth amendments. In this endeavor it is joined by five intervenors. The Corporation for Public Broadcasting, the National Association of Public Television Stations, and the Public Broadcasting Service defend the FCC initiative as consistent with both the first amendment and the APA. Two other intervenors, the National Association of Broadcasters and the Association of Independent Television Systems, Inc., similarly defend the regulations against constitutional and statutory attack.

We, however, need look no further than petitioners' first amendment claims to decide this case. Because we invalidate the entire new must-carry regime as unjustified and as unduly sweeping, we do not reach—and therefore express no opinion on—the subsidiary first amendment challenges to particular facets of the rules, or the arguments based on the APA that the rules are too narrow in scope.

## II. Opinion

### A. *The Appropriate Level of First Amendment Scrutiny*

A threshold question for our first amendment analysis is what standard of review to apply. As in *Quincy Cable TV*, the parties dwell heavily on this issue, offering clever and flavorful analogies to other corners of first amendment law on which more light has been shed.

Petitioners characterize the must-carry rules as posing more than an incidental burden on speech, likening the rules to the newspaper right-of-reply statute invalidated in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), where the Supreme Court held that the enactment impermissibly interfered with the newspaper's constitutionally protected "editorial discretion." Toward this end, petitioners also offer the recent case of *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986), where the Court noted that the selection and organization of programs on cable television does involve some degree of editorial discretion. *Id.* at 2037.[2] *See* Brief for Joint Petitioners at 10-21.

The FCC counters by characterizing the must-carry rules as a commercial regulation that burdens speech in a far more attenuated fashion. Accordingly, the FCC argues, the must-carry rules are more appropriately analyzed under the standards set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1968), where the Supreme Court stated that to be valid, a regulation incidentally burdening speech and not aimed at the suppression of free expression must advance a substantial governmental interest and must be no more restrictive than necessary to accomplish that end. *O'Brien*, 391 U.S. at 377. *See* Brief for FCC at 30-42.

The precise level of first amendment protection due a cable television operator is clearly an issue of much moment to the industry and ultimately to viewers. However, having closely analyzed the rationale for and workings of the new must-carry rules, we conclude that we

---

[2] *Preferred Communications* did not involve restrictions on the contours of a particular cable operator's offerings, as in *Quincy Cable TV* and the present case, but rather the issue of whether municipal restrictions on cable television franchising implicated first amendment interests. The Supreme Court held that they did, and accordingly remanded for a fuller development of the factual issues in the case.

again need not resolve this vexing question. Like the original must-carry regime invalidated in *Quincy Cable TV*, the new, scaled-back edition fails to satisfy even the less-demanding first amendment test of *United States* v. *O'Brien* whose use here is advocated by the FCC. *See, e.g.*, Brief for FCC at 30 (describing *O'Brien* as "the correct test").[3] We now proceed to offer our application of that test.

B. *An* O'Brien-*Test Analysis of the New Regulations*

In *United States* v. *O'Brien*, the Supreme Court stated:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. Typically, analysis under *United States* v. *O'Brien* begins with an appraisal of whether the interest said to be served by a governmental measure is substantial. If it is, we proceed to the more delicate fact-bound issue of whether the means chosen are congruent with the desired end, or whether they are too broadly tailored to pass muster. *See O'Brien*, 391 U.S.

---

[3] In addition to claiming enhanced first amendment protection on *Tornillo* grounds, petitioners also contend that the must-carry rules constitute content-discrimination requiring more substantial governmental justification. *See, e.g.*, Brief for Joint Petitioners at 4-5, 13-21 (stating that the rules favor the speech of certain popular local broadcast licensees with various characteristics). The FCC denies this characterization. *See, e.g.*, Brief for FCC at 32-36. Because we conclude that these rules are invalid even under the *O'Brien* test, we need not resolve this additional claim for stronger first amendment protection.

at 377; *see also Members of City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 804-05 (1984) (applying *O'Brien* test to uphold city ordinance prohibiting posting of signs on public property); *Quincy Cable TV*, 768 F.2d at 1454-62 (using the two-step *O'Brien* framework employed here).

In this endeavor we are mindful of the fact that it is a first amendment test we are applying. Although at times an *O'Brien* inquiry into an agency regulation may appear to resemble an exercise in administrative law analysis, the Supreme Court has often noted that the substantial deference due in the administrative context has little relevance when first amendment freedoms are even incidentally at stake. *See, e.g., Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. at 803 n.22 (courts "may not simply assume that [an] ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity"); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) (holding that no governmental justification existed to support application of a zoning ordinance to bar nude dancing); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 658 (1981) (Brennan, J., concurring in part and dissenting in part) ("As our cases have long noted, once a governmental regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives.").

We stress at the outset that both the justification offered by the FCC for its new regulations and the scope of those new initiatives differ rather markedly from the justification for and scope of the initial must-carry rules struck down in *Quincy Cable TV*.[4] We therefore do not

[4] The FCC's primary justification for the new must-carry rules, as noted previously, is no longer that they are per-

by any means accept petitioners' characterization, *see* Brief for Joint Petitioners at 1, of the new must-carry rules as mere imitations of those invalidated in *Quincy Cable TV* and thus deserving of a hasty execution. Although *Quincy Cable TV* supplies the structural framework for our analysis, the new must-carry rules are to be evaluated on their own terms: they should not suffer

---

manently needed to safeguard the diverse programming generated by protecting local broadcasts. That argument was foreclosed by *Quincy Cable TV*, and the FCC now concedes as well that the spread of A/B switches and antennas to households will ultimately ensure such diversity. *See Report & Order* at ¶ 119 (noting that agency has conceded inadequacy of earlier rationale for must-carry rules). Rather, the FCC makes a more limited argument on behalf of its new rules: that they are needed as an interim measure, to tide the broadcast industry and viewers through the period, estimated by the FCC as five years, during which the American public is introduced to such new technology. *Compare Report & Order* at ¶ 119 (noting that justification for original must-carry rules was to "protect[] one segment of the television industry by substantially limiting the ability of others to offer service to consumers") *with Report & Order* at ¶ 1 ("[t]he new regulatory program is designed to maximize consumers' program choices by developing cable subscribers' awareness of the need for the capability to receive off-the-air broadcast signals independent of their cable service") *and with Recon. Order* at ¶ 47 ("our objective [now is] ensuring viewer access to the maximum number of program choices available through cable and off-the-air broadcast television facilities").

Similarly, the scope of the new must-carry rules is far less sweeping than the regulations we branded as overinclusive in *Quincy Cable TV*. The must-carry rules at issue here require cable operators to set aside no more than one-third of their channels—a far cry from the previous rules, under which must-carry stations could in theory have dominated a cable operator's roster of channels. Additionally, the viewing standard requirement, other first amendment objections aside, does mitigate the possibility of a cable operator being saddled with unpopular and hence unprofitable channels. Finally, the five-year span of the rules necessarily softens their cumulative impact.

by dint of their association with the previous must-carry regime.

Our reservations about the new must-carry rules do, however, implicate both the substantiality of the governmental interest advanced and the narrowness of their design.

1. *The Substantiality of the Governmental Interest*

It may well be that upon a suitable record showing, the justification offered by the FCC, that interim regulations are needed to keep local broadcasts accessible to viewers while the new switch-and-antenna technology takes hold, would satisfy the *O'Brien* standard. *See, e.g., FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 (1981) (deeming "the policy of promoting the widest possible dissemination of information from diverse sources to be consistent with both the [Commission's] public interest standard and the First Amendment"); *cf. FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978) (noting first amendment value of achieving "'widest possible dissemination of information from diverse and antagonistic sources'") (citations omitted). The difficulty is that here, as in *Quincy Cable TV*, the FCC's judgment that transitional rules are needed is predicated not upon substantial evidence but rather upon several highly dubious assertions of the FCC, from which we conclude that the need for a new saga of must-carry rules is more speculative than real. *See, e.g., Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 50 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (requiring agencies to present "a record that convincingly shows a problem to exist" in order to satisfy the "substantial interest" prong of the *O'Brien* test); *see also Quincy Cable TV*, 768 F.2d at 1455 n.44 (noting Supreme Court cases requiring "more than an unsubstantiated assertion of the importance of the governmental interest"). Such speculative

fears alone have never been held sufficient to justify trenching on first amendment liberties.

The agency's first questionable contention is that consumers are not now aware and cannot be expected to become aware in fewer than five years that the installation of an A/B switch could preserve their choice of programs:

> "[T]he perception [exists] that cable systems may be able to preclude access by their subscribers to off-the-air broadcast signals. This perception derives not from any inherent characteristic of cable service, but rather from cable subscribers' current expectation that broadcast signals will always be available as part of their basic cable service. This expectation is a direct result of the former must-carry rules, which, in fact, required cable systems to carry all available off-the-air broadcast television signals. The expectation that local broadcast signals will be carried by their cable system has caused many subscribers to perceive that there is no need to install or maintain the capability to receive broadcast signals off-the-air.
>
> . . .
>
> "If we did not adopt interim must-carry rules now, until our long-term regulatory plan to educate consumers on the need for independent access to off-the-air signals and to make input selector switches available takes hold, harm to the public interest would ensue.

*See Report & Order* at ¶¶ 121, 126.

The FCC, however, adduces scant evidence for its judgment of a widespread "misperception" among cable subscribers that the only means of access to off-the-air signals is through cable service. It puts forth no attitudinal surveys, or polls, suggesting the likely pace of consumer adaptation to the A/B switch technology. Nor does it offer analogies illustrating how swiftly consumers have incorporated previous electronic innovations. Such evidence might have shown what the FCC simply assumes

here: that upon the disappearance of must-carry regulations, consumers would collectively fail to install with any dispatch the switches and antennas necessary to gain access to local broadcast stations, conceivably imperiling the survival of these stations and thereby depriving viewers of diverse broadcasting offerings.

The lone item of "hard" record evidence on which the FCC relies in support of its need for a five-year interim must-carry period is a study entitled, "Outdoor Antennas, Reception of Local Television Signals and Cable Television," prepared by the ELRA Group, Inc., for the National Association of Broadcasters ("NAB"), *see* J.A. at 205 (cited at *Report & Order* at ¶ 124). NAB's members have long benefited from the existence of must-carry rules, and the organization, during rulemaking, strongly criticized alternative proposed regulations that it perceived as inadequately protective of broadcasters, such as reliance on the A/B switch. *See Report & Order* at ¶ 47 (summarizing NAB's statement to FCC).

This NAB study is essentially a statistical compilation of survey results gleaned from a poll of 610 heads of cable households. The FCC cites this survey generally without pinpointing any specific parts of it that would strongly support the new must-carry regime, *see Report and Order* at ¶ 124. We probe its findings in greater detail here, seeking to uncover and evaluate the particular material in it that may reinforce the agency's rationale.

Among its melange of disparate facts and findings, the study includes four items of information that arguably could be said to point to a need for interim must-carry rules: (1) only about 1% of cable subscribers presently have both the outdoor antenna and A/B switch needed to gain access to noncarried local programming in the absence of must-carry rules; (2) many cable viewers originally owning antennas have taken them down, because they were unsightly, and only about 10% of cable

subscribers presently switch back and forth between cable and antennas; (3) a third of cable homes have video cassette recorders and thus may face some increased difficulty attaching the A B switch; and finally, (4) about half of cable subscribers doubted that if local broadcast stations were dropped from cable they would buy what the survey termed a "special switch" enabling them to go back and forth between cable and their antennas. Primarily on the basis of these findings, and particularly the finding that relatively few homes are presently equipped with both antennas and switches, the report concludes that the transition to a world without must-carry could force consumers as a whole to expend millions of dollars. It does not, however, suggest that the new technology would be especially costly to consumers on an *individual* basis. Nor does it estimate how long it would take for most households to acquire and install the required switch and antenna.

Even accepting the NAB's findings as accurate, it requires an inferential leap of some distance to arrive at a need for five more years of must-carry. Only through the rosiest of broadcasters' lenses can the NAB study's first salient finding—that there is a dearth of antenna-and-switch setups in American households—be seen as pointing to the difficulty of installing such gear or to the inability of consumers to learn of their availability. More likely, the absence of such equipment from most homes reflects the obvious reality that, so long as the government requires cable companies to offer local broadcasting through the must-carry regime, such supplemental equipment is unnecessary. The FCC's own determination that the consumer misperception upon which it so heavily relies "is a direct result of the former must carry rules," *see Report & Order* at ¶ 121, seriously undercuts the NAB's implication that the unavailability of switch-and-antenna gear is an endemic or long-term problem.

The NAB study's second finding, that few of those with switch-and-antenna capability currently switch back and forth between cable and broadcast with any regularity, can most reasonably be accounted for by the fact that, in a must-carry world, the need to do so is slight. Like the fact that few households have installed switches and antennas, this finding merely describes present reality without offering any glimpse into how the change of one key variable—the lapse of must-carry regulations—would affect that reality. As petitioner Leghorn, who appeared before the FCC during rulemaking proceedings, observes, *see* Brief for Petitioner Leghorn at 12: "Common sense suggests that consumers who want to receive an off-the-air channel will quickly observe that they may need to purchase (or reconnect) antennas should their cable system cease offering their favorite broadcast stations."

The NAB study's third potentially relevant finding, that many cable subscribers own VCRs and thus would face somewhat complicated problems hooking up the switch-and-antenna, is readily dismissed as a grounds on which to justify the need for new must-carry regulations: the FCC itself, in its report explicating the new regulations, specifically discounts reliance on the VCR-interference theory. The Commission concluded:

> We believe that any equipment compatibility problems can be overcome through relatively minor modifications to switching devices and that cable operators and other equipment suppliers can provide the information and/or assistance consumers need to install the switches for use with VCRs.

*See Report & Order* at ¶ 167 (observing as well that "many of these concerns may become moot if television receivers begin to be manufactured with switching or interface devices built in"); *see also Recon. Order* at ¶ 51 (noting that "[e]vidence that subscribers can make complex cable connections correctly is provided by the fact

that there have been no widespread problems or difficulties encountered by consumers in installation of cable-ready VCRs and receivers . . . many cable subscribers now are acquiring and successfully installing their own cable terminal/converter equipment").

The NAB study's final pertinent observation is that about half of the survey's respondents are unwilling to predict that they would ultimately purchase what the survey question termed a "special switch." Initially, we note that this characterization obscures somewhat the low price and easy installation of the A/B switch. Survey imperfections aside, however, this finding seems to us unpersuasive, for it almost certainly reflects merely the present consumer unfamiliarity with the switch and antenna mechanism. To the extent it does not, it may also reflect consumer disinterest in having access to off-the-air signals. Either way, this finding hardly explains why the five-year transitional period chosen by the FCC is necessary. The NAB's study thus provides only the spongiest of foundations for the FCC's asserted justification for its regulations.

In appraising the FCC's argument that the indelibility of consumer ignorance justifies the reimposition of must-carry rules, we are thus left to ask whether the FCC's contention is so obvious or commonsensical that it needs no empirical support to stand up. We conclude that it is not. For one thing, the FCC's own report elsewhere belies the agency's fears of viewer lethargy. The Commission notes:

> There is evidence that video consumers are now becoming accustomed to switching between alternate program input sources. We observe that many cable systems now offer services through dual cables in order to provide greater channel capacity. Such systems employ switching devices to select between the two cables and often mark the switch positions with "A" and "B" designations. *Cable subscribers*

> *apparently have accepted this switching arrangement and do not find it inconvenient.*

*See Report & Order* at ¶ 164 (emphasis added).

More generally, we simply cannot accept, without evidence to the contrary, the sluggish profile of the American consumer that the Commission's argument necessarily presupposes. In a culture in which even costly items like the video-cassette recorder, the cordless telephone, the compact disc-player and the home computer have spread like wildfire, it begs incredulity to simply assume that consumers are so unresponsive that within the span of five years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows.[5]

Even were we to accept, however, the Commission's view that consumer ignorance cannot be readily eradi-

---

[5] The Commission's report on the new must-carry regulations also rules out several alternative conceivable justifications for the new regulations raised by broadcasting interests during rulemaking. Contrary to broadcasters' assertions, the FCC specifically found concerns about the adequacy of input selector switches to be "overstated" and discounted reliance on this argument as a basis for its regulations. *See Report & Order* at ¶ 165. Likewise, the Commission dismisses the argument that indoor antennas are difficult or expensive to install. *See Report & Order* at ¶ 166 ("[t]he relatively low cost and simple installation of indoor antennas can be expected to make it easy for cable subscribers to acquire the capability to receive broadcast stations not carried on cable"); *see also Quincy Cable TV*, 768 F.2d at 1457 n.48 (noting that Commission had conceded that switching devices do not pose a significant barrier to receiving off-the-air signals). Finally, the Commission notes, "[t]he argument that outdoor antennas are sometimes prohibited ignores the fact that in many of these situations it is possible to receive signals of acceptable quality using an inexpensive indoor, set-top antenna. . . . Attic antennas which can give additional off-the-air reception capability are also available." *Report & Order* at ¶ 166.

cated, we have a second fundamental problem with the Commission's judgment that its interim must-carry rules are needed to advance a substantial governmental interest sufficient to support burdening cable operators' first amendment rights. The Commission relies heavily on its assumption that in the absence of must-carry rules, cable companies would drop local broadcasts. Experience belies that assertion. As cable operators reported to the Commission during rulemaking proceedings, *see Report & Order* at ¶ 53, during the 16 months that elapsed between *Quincy Cable TV* and the reimposition of the modified must-carry rules, cable companies generally did not drop the local broadcast signals that they had been carrying prior to *Quincy Cable TV*.

The FCC responds that this constitutes "only limited direct evidence," and that in any event some cable companies did drop individual broadcast stations, *see Report & Order* at ¶ 131. One might also speculate on behalf of the FCC that the inaction of cable companies after *Quincy Cable TV* may have partially resulted from their expectation that some new must-carry rules would inevitably emerge. Nevertheless, given *Quincy Cable TV's* vigorous denunciation of the breadth of the old must-carry rules, one can hardly assume that cable companies expected the FCC to reintroduce anything like the old sweeping must-carry requirements. Also undercutting the FCC's fearful assumption is the fact that both the Federal Trade Commission and the Department of Justice have concluded, in separate reports, that the absence of must-carry would not harm local broadcasting. *See Report & Order* at ¶ 54 (noting Federal Trade Commission study, submitted in FCC rulemaking, that an analysis of 24 satellite television stations showed that "absent must-carry rules, cable systems can be expected to carry many or most local broadcast stations"); *id.* at ¶ 55 (noting that Department of Justice also concludes that must-carry rules are not needed to foster localism); *id.*

at ¶ 114 (FCC acknowledges during post-*Quincy Cable TV* hiatus that "many cable systems are now providing locally originated programming services").

For these reasons, we conclude that the FCC has not demonstrated that the new must-carry rules further a substantial governmental interest, as the rules must to outweigh the incidental burden on first amendment interests conceded by all parties here. As we stated in *Quincy Cable TV*, "[a]t least in those instances in which both the existence of the problem and the beneficial effects of the agency's response to that problem are concededly susceptible of some empirical demonstration, the agency must do something more than merely posit the existence of the disease sought to be cured." 768 F.2d at 1455. The FCC error in this case was its failure to go that extra step here.

2. *The Congruence Between Means and Ends*

The second prong of the *O'Brien* test focuses on the congruence between the means chosen by the agency and the end it seeks to achieve. In this case, even were we convinced that the interest in whose name the FCC purports to act was more than a "fanciful threat," *see Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 50 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), the new must-carry regulations, because of their lengthy duration, are too broad to pass muster even under the *O'Brien* test.

If any interim period of must-carry rules is, in fact, necessary, the FCC adduces literally no evidence that this period must last for fully five years. Such a period is strikingly long in an industry that the FCC itself characterizes as "rapidly evolving." *See Report & Order* at ¶ 133. In the absence of any empirical support for the new must-carry rules, the FCC falls back on what it terms a "sound predictive judgment," *see Recon. Order* at ¶ 62, that it will take about five years for consumers

to learn about the switch-and-antenna mechanism, and thus that a five-year transition period is needed during which the agency will provide consumer education.

We are, however, unpersuaded. In large part our reluctance to countenance reimposing must-carry rules for five years based on a "sound predictive judgment" that is never explained reflects our perceptions about consumer aptitude stated earlier. Such a guess about consumer instincts hardly presents the sort of issue where, "if complete factual support . . . for the Commission's judgment or prediction is not possible," we should defer to the Commission's expert judgment. *See FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. at 814. It is wholly unclear to us why it should take five years to inform consumers that with the installation of a $7.50 switch and a television antenna they can view more local channels. The FCC report does nothing to shed light on this matter.

Additionally, we are skeptical—and the FCC's report says nothing to relieve this skepticism—that any consumer education campaign will have much impact so long as viewers can continue to rely on must-carry to get their fix of local broadcasts. It is entirely likely that not until the waning few months of the five-year must-carry regime would the FCC's admonitions about the need for switches and antennas begin to sink in, much as the existence of switches and antennas has largely gone unnoticed in a consumer population already accessed to local television as a result of must-carry in recent years. Opting for a five-year interim period therefore merely delays the inevitable, but almost certainly brief, period during which TV owners will learn of, purchase, and install the requisite equipment.[6] We therefore find it diffi-

[6] In addition to our concerns about the unnecessary duration of these "interim" rules, we are unconvinced, based on our reading of the agency record, that the Commission was correct to dismiss peremptorily the less restrictive alterna-

cult to defer blindly to the Commission's unproven belief that half a decade is necessary.

## III. Conclusion

Our decision today is a narrow one. We hold simply that, in the absence of record evidence in support of its policy, the FCC's reimposition of must-carry rules on a five-year basis neither clearly furthers a substantial governmental interest nor is of brief enough duration to be considered narrowly tailored so as to satisfy the *O'Brien* test for incidental restrictions on speech. We do not suggest that must-carry rules are *per se* unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial governmental interests. But when trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures. As in *Quincy Cable TV*, we reluctantly conclude that the FCC has not done so in this case, but instead has failed to " 'put itself in a position to know' " whether the problem that its regulations seek to solve " 'is a real or fanciful threat.' " *Quincy Cable TV*, 768 F.2d at 1457-59 (quoting *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 50 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977)). Accordingly, we have no choice but to strike down this latest embodiment of must-carry.

---

tives to must-carry rules proposed during rulemaking and during the Commission's reconsideration of the new rules by petitioners and intervenors, and particularly by petitioner Richard Leghorn. *See Report & Order* at ¶¶ 174-75 (rejecting Leghorn proposal that would, among other things, require that all new televisions be built with switches); *see also Recon. Order* at ¶ 56 (same). Nevertheless, because we invalidate the new must-carry rules on the grounds already stated, we do not decide this issue and do not base our decision on any judgment as to the relative desirability of these alternative proposals.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 86-1683

CENTURY COMMUNICATIONS CORPORATION, et al.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
SPANISH INTERNATIONAL COMMUNICATIONS CORP.,
UNIVISION, INC.,
THE NATIONAL ASSOCIATION OF BROADCASTERS,
LINCOLN BROADCASTING CO.,
NATIONAL CABLE TELEVISION ASSOCIATION, et al.,
OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,
CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL ASSOCIATION OF PUBLIC TELEVISION,
PUBLIC BROADCASTING SERVICE,
NATIONAL BROADCASTING CO., INC.,
SPANISH INTERNATIONAL COMMUNICATIONS CORP.,
INTERVENORS

---

No. 87-1280

RICHARD S. LEGHORN, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

CORPORATION FOR PUBLIC BROADCASTING, et al., INTERVENORS

---

No. 87-1301

HUBBARD BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

CORPORATION FOR PUBLIC BROADCASTING, et al., INTERVENORS

---

Petitions for Review of Orders of the Federal Communications Commission

---

On Motion For Clarification of Opinion Issued December 11, 1987

---

Filed January 29, 1988

Before: WALD, *Chief Judge*, and MIKVA, *Circuit Judge*.

ORDER

Upon consideration of Respondent Federal Communications Commission's motion for clarification of the Court's

opinion of December 11, 1987, and of Petitioner Century Communications Corporation's opposition thereto, the motion is granted.

The Court's opinion in *Century Communications Corp.* v. *Federal Communications Commission*, No. 86-1683, slip op. (D.C. Cir. Dec. 11, 1987) is hereby clarified as follows:

(1) The Court has invalidated the interim "must carry" rules of the Federal Communications Commission that became effective on June 10, 1987. Those rules required cable systems to carry certain broadcast signals. *See* 47 C.F.R. § 76.56 (mandatory carriage of television stations); § 76.58 (disputes concerning carriage); § 76.60 (carriage of other television signals); § 76.62 (manner of carriage); *see also* 47 C.F.R. § 76.5 (as amended August 7, 1986 and/or March 26, 1987); § 76.53 (same); § 76.55 (same); § 76.64 (same).

(2) The Court has not struck down the requirements concerning input selector switches and consumer education due to take effect February 29, 1988. *See, e.g.*, § 76.66 (input selector switches and consumer education). Those separate requirements were not included in petitioners' first amendment and statutory challenge to the must-carry regulations, which impermissibly infringed on the first amendment rights of cable operators. Nor are the input selector and consumer education requirements so inextricably bound up with the must-carry requirements as to constitute an inseparable package. Rather, they are independent measures designed toward the same end as the invalidated must-carry rules: easing a transition to a world without must-carry channels.

(3) Insofar as portions of the rules regarding consumer education and input selector switches do make references to the now-invalidated must-carry provisions, we instruct the Commission on remand to make appropriate adjustments in light of the invalidation of the interim must-carry rules.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

---

## MM Docket No. 85-349[1]

---

In the Matter of

Amendment of Part 76 of the
Commission's Rules Concerning
Carriage of Television Broadcast
Signals by Cable Television Systems

**REPORT AND ORDER**
**Proceeding Terminated**

**Adopted: August 7, 1986;** **Released: November 28, 1986**

By the Commission: Commissioners Quello and Dawson issuing separate statements.

---

[1] The issues left open in Docket Nos. 21323, 81-741, and 84-168 relating to cable carriage of multi-channel television sound, program-related teletext, and program-related communications on the vertical blanking interval also will be addressed herein. *See Memorandum Opinion and Order* in Docket Nos. 21323, 81-741, and 84-168, adopted February 8, 1985, 50 FR 11000.

## TABLE OF CONTENTS


| | Page |
|---|---|
| 1. INTRODUCTION | 34a |
| 2. BACKGROUND | 35a |
| 3. SUMMARY OF THE RECORD | 49a |
| A. Comments Concerning the Federal Interest | 49a |
| B. Comments Concerning the Need for Regulation | 53a |
| C. Proposals | 66a |
| 4. DISCUSSION | 93a |
| A. The Federal Interest | 93a |
| B. The Need for Regulation | 98a |
| C. Policy Decision | 109a |
| D. Description of the New Rules | 112a |
| E. The New Rules Meet the Need for Regulation | 125a |
| F. Alternative Proposals Considered and Rejected | 132a |
| 5. CONSTITUTIONAL AND STATUTORY CONSIDERATIONS | 136a |
| A. First Amendment Issues | 136a |
| B. Other Constitutional and Statutory Concerns | 154a |
| 6. OTHER REGULATORY FACTORS AFFECTING TELEVISION MARKETS | 160a |
| 7. PROCEDURAL MATTERS | 162a |

## INTRODUCTION

1. By this action, the Commission is adopting a two-part regulatory program that eventually will eliminate the need for cable television mandatory signal carriage regulation. The previous "must carry" rules were held constitutionally invalid by the United States Court of Appeals for the District of Columbia Circuit in *Quincy Cable TV, Inc. v. FCC (Quincy).*[2] The first part of the new regulatory program will require cable systems to offer subscribers input selector switches for use with antennas and to conduct a consumer education program concerning the purpose of, and need for, maintaining off-the-air reception capability.[3] The second part of this plan consists of interim must carry rules that are intended to provide an orderly transition to a new environment. Thus, the new must carry rules will expire at the end of a five year transition period. These interim must carry rules are a modified version of the proposed industry agreement that was filed jointly by several of the major broadcast and cable trade associations.[4] The modifications to the industry agreement include specific protections for noncommercial educational and new commercial broadcast stations. The new regulatory program is designed to maximize consumers' program choices

---

[2] 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 54 U.S.L.W. 3806 (U.S. decided June 9, 1986) (No. 85-502).

[3] An input selector switch is any device that enables the viewer to select between cable service and off-the-air reception of broadcast signals. Although such devices are often referred to as "A/B" switches, they may, in fact, be more sophisticated than a mere two-sided switch, may utilize other cable interface equipment, and may be built into consumer television receivers.

[4] The parties endorsing this agreement are the National Association of Broadcasters (NAB), The Association of Independent Television Stations (INTV), the Television Operations Caucus (TOC), the National Cable Television Association (NCTA), and the Community Antenna Television Association (CATA).

by developing cable subscribers' awareness of the need for the capability to receive off-the-air broadcast signals independent of their cable service. We believe that this program provides a constitutionally acceptable balance between the need to protect this federal and the First Amendment rights of cable operators.

## BACKGROUND

2. The Commission's former must carry requirements for cable television systems are set forth in Sections 76.57-76.61 of its rules.[5] Under these rules, a cable system was required, upon request and within the limits of its channel capacity, to carry the signals of all local broadcast television stations. In general, a station is considered local if the station or its market encompasses, or is in close proximity to, the cable system's community, or if the station's signal otherwise is "significantly viewed" by off-the-air viewers in the cable system's community. The specific provisions of the must carry rules vary depending on the size of the market in which the cable system is located.[6] In accordance with the *Quincy* decision, the Commission suspended enforcement of the must carry rules, effective July 19, 1985.[7]

3. *Development of the Rules.* Broadcast television stations and cable television systems provide services and operate in manners that in some respects are complementary and in others highly competitive. Broadcast television stations offer advertiser-supported or public-supported "free" over-the-air service to their local communities. In

---

[5] *See* 47 CFR §§76.57-76.61.

[6] There are separate versions of the must carry rules for cable systems operating: 1) outside all television markets: 2) in smaller television markets; and 3) in major television markets. *See* 47 CFR §§76.57, 76.59, and 76.61.

[7] *See* "Suspended Enforcement of Certain Sections of 47 CFR Part 76," Public Notice, released September 10, 1985, 50 FR 38003.

contrast, cable systems offer multiple video services to fee-paying subscribers through the facilities of a coaxial cable. In addition to local television stations, cable systems may carry program services from other sources such as distant television stations, special satellite-delivered cable networks and premium services and local origination channels.

4. Because of their ability to bring additional competing program services into local television markets and their perceived potential to operate as "gatekeepers" who control the off-the-air program services available to their subscribers, cable systems were viewed early in their development as potentially harmful to local broadcast television service. The Commission was initially reluctant to assert jurisdiction over the cable industry and to regulate its activities.[8] However, in the early 1960's the Commission observed increases in the number of cable systems and undertook to begin developing a comprehensive program for regulating the growth of the cable industry and its impact on the existing broadcast television service. The must carry rules were the cornerstone of this program.

5. The Commission first acted to require cable carriage of local television service in 1962, in *Carter Mountain Transmission Corp.*[9] In that decision, the Commission specified a requirement for carriage of a local television station as a condition for grant of a construction permit for a microwave system to feed distant signals to a rural cable system. This requirement was extended to all microwave-fed cable systems in 1965, in the *First Report*

---

[8] *See Frontier Broadcasting Company v. Collier*, 24 FCC 251 (1985); *recon. denied* in conjunction with *Report and Order* in Docket No. 12443, 26 FCC 403, 428 (1959).

[9] *See Carter Mountain Transmisson Corp.*, Docket No. 12931, 32 FCC 459 (1962), aff'd 321 F.2d 359 (D. C. Cir.), *cert. denied*, 375 U.S. 951 (1963).

*and Order* in Docket Nos. 14895 and 15233.[10] A year later, in the *Second Report and Order* in Docket Nos. 14895 and 15233, the Commission applied must carry requirements to all cable systems, regardless of whether or how they imported distant signals.[11] In the 1972 *Cable Television Report and Order,* the Commission "fine-tuned" the must carry rules in accordance with the implementation of comprehensive rules for regulation of the cable industry.[12]

6. In adopting must carry requirements, the Commission held that oversight of cable television was necessary to fulfill its statutory obligations under the Communications Act of 1934, as amended.[13] In this respect, the Commission stated that the Communications Act charges it with the duty "to make available, so far as possible, to all people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communications service" (47 U.S.C. §151) and "generally to encourage the larger and more effective use of radio in the public interest" (47 U.S.C. §303(g)). It also stated that it is required "to make

---

[10] *See First Report and Order* in Docket Nos. 14895 And 15233, 38 FCC 683 (1965).

[11] *See Second Report and Order* in Docket Nos. 14895 and 15233, 2 FCC 2d 725 (1966).

[12] *See Cable Television Report and Order,* Docket Nos. 18397, *et al.*, 36 FCC 2d 143 (1972). Many of the provisions of the *Cable Television Report and Order,* particularly those pertaining to carriage of distant signals, have now been eliminated. *See e.g., Report and Order* in Docket No. 19859, 57 FCC 2d 68 (1976) [permitting additional carriage of network news programs]; *Report and Order* in Docket No. 20681, 60 FCC 2d 672 (1976), and *Report and Order* in Docket No. 21002, 66 FCC 2d 380 (1977) [modifying and deleting requirements for local cable franchises]; *Report and Order* in CT Docket No. 78-206, 69 FCC 2d 697 (1978) [eliminating certificate of compliance procedures]; *Report and Order* in Docket Nos. 20988 and 21284, 79 FCC 2d 663 (1980), *aff'd sub nom. Malrite TV of New York v. FCC,* 652 F.2d 1140 (2d Cir.), *cert. denied,* 454 U.S. 1143 (1981) [eliminating distant signal and syndicated exclusivity rules].

[13] *See First Report and Order, supra at 697.*

such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (47 U.S.C. §307(b)). The Commission indicated that under these statutory provisions, its duty was "to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis."[14] If further explained that it sought to fulfill this responsibility through the table of television channel assignments in Section 73.603 of the rules.

7. The Commission's decision to regulate cable systems grew out of its concern that the "explosive" nationwide growth of cable service threatened to harm the existing local television service as provided under the channel assignment plan.[15] After examining the nature and operation of cable systems, the Commission determined that it could not rely on cable as a primary means to achieve its television service allocation objectives. The Commission observed that because of the prohibitive cost of extending cable service beyond built-up areas, cable systems could not serve many persons reached by broadcast signals. The Commission noted that households unable to obtain cable service, and those who cannot afford or are unwilling to pay for it, are entirely dependent on local or nearby stations for their television service.[16] The Commission also considered that local television stations afford a means for community self-expression, whereas very few cable systems originate local programming. Finally, the Commission indicated that it intended for the commercial television system to distribute programs to the public through a multiplicity of local outlets.

---

[14] Id. at 699.

[15] Id. at 685-699.

[16] Id. at 699.

8. On this basis, the Commission concluded that cable was a "supplementary" service and that it was necessary to protect local broadcast television service from any adverse effects from competition with cable services, particularly the importation of distant signals. However, the Commission also recognized that cable facilities could provide significant public interest benefits by assisting in expansion of television service in undeserved areas. Thus, the Commission felt that it was of the utmost importance to the public interest that extensions of television service by the auxiliary facilities of cable be accomplished in a fair and equitable manner and that cable and broadcast facilities have complementary, rather than conflicting roles.[17]

9. In developing policy to regulate cable growth, the Commission devoted substantial attention to the economic relationship between broadcast stations and cable systems and the conditions under which competitive impact occurs. The basic analysis of this relationship as relied upon by the Commission was as follows.[18] Cable systems bring to areas already served by one or more television stations the signals of other stations that are well beyond the normal range of reception. These additional signals compete with the local stations for a share of the available audience. If subscribers view distant signals to the exclusion of local stations, the audience will become fragmented and the local stations will lose viewers. As the audience a station can deliver decreases, advertisers will demand lower prices per unit of air time, and station revenues and profits will decline. Decreased revenues and profit will cause the local station to reduce its program efforts, and thereby to reduce its service to the public. Most importantly, it was assumed that in cases where a cable system did not carry a particular local station, each gain of a subscriber by the

---

[17] Id.

[18] Id. at 702-703; *see also Second Report and Order, supra at 737.*

cable system would mean the full loss of a potential viewer for the station. The Commission recognized the possibility that the viewer access problem could be solved through the use of A/B switches that would permit cable subscribers to alternate as needed between an off-the-air antenna and the cable.[19] However, it rejected this as a solution on the grounds that then existing switches were ultimately inconvenient and would not be used by subscribers.

10. In view of these considerations, the Commission drew two broad conclusions with respect to cable signal carriage:

> 1) As a competitive practice, the failure or refusal by a cable system to carry the signal of a local station is inconsistent with the principle that cable should supplement, but not replace, over-the-air television service, and;
>
> 2) Because it is inconsistent with the concept of cable as a supplementary service, an unreasonable restriction on the local station's ability to compete, and patently destructive of the Commission's goals in allocating television channels to different areas and communities, a cable system's failure to carry the signal of a local station is inherently contrary to the public interest.[20]

11. The Commission stated that in light of the basic conditions under which competition occurs between cable systems and broadcast television stations, its decision to adopt must carry rules did not depend on a showing that cable competition is demonstrably certain to cause widespread and serious damage to the public interest in television service. It asserted that it would be contrary to the public interest to defer action until a serious loss of ex-

---

[19] *See First Report and Order, supra at 702.*

[20] Id. at 705.

isting and potential service had occurred, or until existing service had been significantly impaired—i.e., to wait "until the bodies pile up" before conceding that a problem exists.[21]

12. Nonetheless, the Commission considered the numerous empirical studies and analyses that were available concerning the impact of cable television. It concluded that it was "impossible, from The data at hand, to isolate reliably the effects of [cable] competition from all of the other factors which operate to produce particular financial results in different settings."[22] However, it also found that the available empirical data and studies demonstrated that cable could have a substantial negative effect upon station revenues and audiences.[23] The Commission further concluded that because of cable's rapid growth, the problem was likely to be more serious in the future than it had been in the past.[24]

13. A year later the Commission extended the must carry rules to all cable systems. In its decision, the Commission stated that its analysis with respect to the need for regulatory action in the *First Report and Order* applied equally to nonmicrowave served cable systems.[25] It noted that the economic studies considered in its initial adoption of mandatory signal carriage requirements concerned microwave as well as nonmicrowave cable systems. The Commission declined to conduct a further fact-finding inquiry on nonmicrowave cable systems because such studies were proving to be out-of-date almost before there was time to consider them.

---

[21] Id. at 701.

[22] Id. at 710.

[23] Id. at 710-711.

[24] Id. at 711.

[25] *See Second Report and Order, supra at 744.*

14. The Commission has not readdressed the basic rationale or underlying predicates for the must carry rules in the time Since their initial adoption. The rules currently suspended are essentially the version that was adopted in the 1972 *Cable Television Report and Order.*

15. Over the years, the cable industry has continued to grow and develop. Cable systems are no longer simply auxiliary facilities for retransmitting the signals of broadcast television stations. Rather, they have evolved as providers of a multiplicity of video services from a broad range of program sources, some of which are original to cable. These changes have not gone unnoticed by the Commission. In the *Economic Inquiry Report,* the Commission recognized that the growth of cable and other program delivery systems such as videocassette recorders (VCRs) was changing the video services market and that cable in particular was no longer an auxiliary or secondary distribution service.[26] The Commission observed that video services were being provided by a more diverse set of media and that this trend was likely to grow and develop to a greater extent in the future. The Commission further stated that it has become clear that the supply of home entertainment and information services could be increased through this greater variety of delivery alternatives. It concluded that with the advent of these new services, the justifications for attempting to control cable had declined accordingly.[27] This change in the nature of cable and the video industry resulted in the Commission's decision to eliminate most of the rules other than must carry that were adopted as part of the comprehensive cable regulatory plan.[28]

---

[26] *See Economic Inquiry Report,* Docket No. 21284, 71 FCC 2d 645-646 (1979); *see also Report and Order* in Docket No. 20988, *supra* at 686.

[27] *See Economic Inquiry Report, supra at 646.*

[28] *See Cable Television Report and Order, supra.*

16. Moreover, Congress recognized the emergence of the cable industry as a major participant in the market for television services in the Cable Communications Policy Act of 1984 (Cable Act).[29] This legislation, which was signed into law on October 30, 1984, amended the Communications Act by adding a new Title VI, entitled "Cable Communications."[30] The intent of the Cable Act is to establish a national policy that encourages the growth and development of cable television services and assures that cable systems are responsive to the needs and interests of the local communities they serve.

17. *The Quincy Decision.* On July 19, 1985, the United States Court of Appeals for the District of Columbia Circuit ruled in the *Quincy* case that the Commission's must carry rules were unconstitutional.[31] In *Quincy,* the court considered whether the must carry rules violate the First Amendment rights of cable operators, cable programmers and the viewing public. It found that the rules unconstitutionally infringe upon cable operators' rights to freely exercise editorial discretion in selecting the content of program services provided by their cable systems.[32] It further found that the must carry rules could also affect the First Amendment rights of cable programmers and subscribers. In this respect, it indicated that if a cable system's channel capacity is substantially or completely occupied by man-

---

[29] Cable Communications Policy Act of 1984, Pub.L. No. 98-549, § *et seq.*, 98 Stat. 2779 (1984).

[30] 47 U.S.C. §521 *et seq.*

[31] *Quincy, supra.* The *Quincy* decision arose from the court's consolidation of two separate cases, *Quincy Cable TV, Inc. v. FCC and Turner Broadcasting System, Inc. v. FCC.* In the former, a cable system challenged a Commission order requiring it to carry certain stations under the must carry rules. In the latter, TBS appealed the Commission's dismissal of its petition for rule making to eliminate the must carry rules.

[32] Id. at 1452.

datory carriage signals, cable programmers may be prevented from reaching their intended audiences and subscribers' viewing preferences may be disregarded.[33]

18. The court used a two step procedure to determine the appropriate standard of review for assessing the constitutionality of the must carry rules. It first evaluated the propriety of applying the lenient First Amendment standard traditionally utilized in assessing the constitutionality of broadcast regulation.[34] Cognizant of the "[S]upreme Court's repeated admonitions to be sensitive to the unique features of each medium of expression,"[35] the court determined that the "scarcity rationale" sustaining much of the regulation of broadcasting "has no place in evaluating government regulation of cable television."[36] The court was unable to discern any attributes of cable that would justify use of the standard traditionally applied to the broadcast media, and concluded that it "must look elsewhere to determine the appropriate yardstick against which to measure the constitutionality of the must-carry rules."[37]

19. The court next considered, but did not decide, whether to apply the balancing test established for "incidental" burdens on speech set forth in *United States v. O' Brien (O' Brien)*,[38] or the more stringent standard for content-based regulations enunciated in *Miami Herald Publishing Co. v. Tornillo (Miami Herald)*.[39] It examined

---

[33] Id. at 1453.

[34] *See e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

[35] *Quincy, supra at 1444.*

[36] Id. at 1449.

[37] Id. at 1450.

[38] 391 U.S. 367 (1968).

[39] 418 U.S. 241 (1974). *Miami Herald* involved a newspaper, and the First Amendment standards explicated therein are generally applied to the print media. The *Quincy court* explained that "for cable, no less than for other media, the First Amendment draws a distinction between

the purposes underlying the must carry rules and the nature and degree of the intrusions they effect, and was unable to conclude that they burden First Amendment rights only incidentally. In this regard, the court determined that the must carry rules favor one group of speakers, broadcasters, over another, cable programmers; they coerce speech by significantly compromising cable operators' otherwise broad editorial discretion; and, where channel capacity is at least substantially occupied by mandatory signals, they are a barrier between cable programmers and their audience and may cause viewers' preferences to be disregarded. In light of these intrusions on rights and activities protected by the First Amendment, the court had "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech."[40]

20. However, assuming for purposes of analysis that the rules impose only an incidental burden, the court concluded that, as written, the must carry regulations are "clearly impermissible" under the *O' Brien* standard.[41] It did not hold that mandatory carriage regulations are constitutionally infirm *per se,* or that the *O' Brien* formula is the appropriate standard for reviewing the constitutionality of cable regulations generally, or must carry regulations specifically. To the contrary, the court explicitly stated that since the rules are unconstitutional under the incidental burdens formula it did not need to "definitively decide" whether a "more exacting" standard is The correct test, and left unresolved whether any form of mandatory car-

---

'incidental' burdens on speech—regulations that evince a governmental interest unrelated to the suppression or protection of a particular set of ideas—and restrictions that are intended to curtail expression." *Quincy, supra* at 1450, *quoting Home Box Office, Inc. v. FCC,* 567 F. 2d 9 (D.C. Cir.) *(percuriam), cert denied,* 434 U.S. 829 (1977).

[40] *Quincy, supra at 1453.*

[41] Id. at 1454.

riage requirement could comply with the strictures of the First Amendment.[42]

21. The court stated that under an *O'Brien* analysis, a content-neutral regulation "will be sustained if it furthers an important or substantial governmental interest . . . and if the incidental restriction of an alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[43] In applying the first part of the *O'Brien* test, the court assumed that the preservation of free, locally-oriented television is an important regulatory goal. It Stated, however, that "the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms,"[44] and determined that the Commission had not met its heavy burden of demonstrating that the must carry regulation would vindicate the articulated governmental interest.

22. Part two of the *O'Brien* standard as applied by the *Quincy* court balances the governmental interest articulated in part one against the degree of intrusion on protected First Amendment activity caused by the regulation. According to the court, in order to pass constitutional muster, the regulation must be the least restrictive means for protecting a valid federal interest, that is, the restriction on First Amendment rights may be no greater than essential to the furtherance of the governmental interest.[45]

---

[42] Id. The court stated that if *Miami Herald* is the appropriate standard for constitutional scrutiny of the must carry rules, it would be unnecessary to test them against any other standard. The court also stated that "once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic unity for purposes of the First Amendment, the analogy to more traditional media is compelling." Id. at 1450.

[43] Id. at 1451, *quoting United States v. O'Brien, supra at 377.* (ellipses in original.)

[44] *Quincy, supra at 1454.*

[45] Id.

23. As part of its determination as to the constitutional sufficiency of the fit between the federal interest in preserving free local television service and the must carry rules, the court emphasized that the distinction between protecting local broadcasting and local broadcasters is critical. It stated that the rules are intended to protect local broadcasting, but, as written, they are overinclusive and indiscriminately protect every broadcaster. In this regard? the court stated that the rules do not take into consideration whether or to what degree the affected cable system poses a threat to the local broadcast station's economic well-being, the quantity of local service available in the cable community, or the number of local outlets already carried by the cable operator.[46]

24. In closing, the court stated that it did not find it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment.[47] The court also stated that "[s]hould the Commission wish to redraft the rules in a manner that is more sensitive to the First Amendment concerns . . . it is, of course, free to do so."[48]

25. *The Notice of Proposed Rule Making.* Subsequent to the *Quincy* decision, the Commission received Petitions for Rule Making from the Association of Independent Television Stations, the National Association of Broadcasters, *et al.*, and the Corporation for Public Broadcasters, *et al.* (CPB), concerning cable carriage of broadcast television

---

[46] Id. at 1460. Additionally, the court noted that the rules apply with equal force to all cable systems and do not distinguish among cable systems based on their channel capacity or the extent to which they are saturated with must carry signals. Id. at 1462, n. 55.

[47] Id. at 1434.

[48] Id. at 1463.

signals.[49] These petitions asked the Commission to adopt new must carry rules that would meet the constitutional concerns raised by the court.

26. In response to these petitions, the Commission adopted a combined *Notice of Inquiry and Notice of Proposed Rule Making (Notice)* on November 14, 1985, 50 FR 48232, to consider the matter of signal carriage rules for cable systems. Eighty-five parties filed comments and twenty-eight parties filed replies in response to the *Notice*.[50] In addition, many members of Congress submitted letters concerning this matter and many other parties filed informal comments.

27. On March 21, 1986, several of the major broadcast and cable industry associations submitted an "industry agreement" to the Commission for consideration as a plan for new must carry rules.[51] In response to the filing of the industry agreement, the Commission issued an *Order* on March 25, 1986, 51 FR 11073, requesting additional comment on the must carry matter and the industry proposals in particular. Sixty-four parties filed formal comments addressing the industry agreement.[52]

28. *Overview of the Decision.* In the time since the *Quincy* decision, the Commission has been without a com-

---

[49] NAB was joined in its petition by the Association of Maximum Service Telecasters, the Station Representatives Association, the American Broadcasting Companies, Inc., CBS Inc., the National Broadcasting Company, Inc., the ABC Affiliates Association, the Spanish International Communications Corporation, Bahia de San Francisco Television Company, The Seven Hills Television Company, and the National Religious Broadcasters. CPB was joined in its petition by the National Association of Public Television Stations and the Public Broadcasting Service.

[50] A list of parties filing comments in response to the *Notice* is provided in Appendix A.

[51] *See footnote 4, supra.*

[52] A list of the parties filing responses to the industry agreement is provided in Appendix A.

prehensive system of rules for regulating cable subscribers' access to broadcast signals. We recognize that this situation has been the subject of considerable concern on the part of broadcast interests and, more recently, many members of Congress and their staffs.[53] In this respect, it has been expressed that there is need for new must carry rules and that we should act expeditiously to complete this proceeding. In view of these concerns, we believe it is appropriate and desirable that we not delay our decision in this matter.

29. In considering the matter of signal carriage regulation for cable television systems, we will begin with an examination of the federal interests that may be affected by issues pertaining to cable carriage of broadcast stations. We next will examine the need for regulation to protect our federal interests. In this context, we will consider the various proposals for addressing the need for regulation and then will discuss our decision to adopt a two part regulatory program that will eventually eliminate the need for cable mandatory signal carriage regulation.

## SUMMARY OF THE RECORD

### Comments Concerning the Federal Interest

30. Broadcast interests argue that the Commission's fundamental statutory obligation to promote the widest possible dissemination of local television service will be jeopardized if cable television systems are not subject to some form of mandatory carriage requirements. In particular, broadcasters cite the Commission's adoption of the TV Table of Allotments which is designed to assure that

---

[53] Specific plans and proposals for resolving the must carry matter were submitted to the Commission by Senator John C. Danforth, Chairman of the Senate Committee on Commerce, Science, and Transportation and Congressman Timothy Wirth, Chairman of the House Subcommittee on Telecommunications, Consumer Protection, and Finance.

as many communities as possible have the opportunity for at least one station. They remind the Commission that under its localism policy, broadcasters have a responsibility to provide public service programming that is responsive to the needs and issues in their local communities. Broadcasters generally submit that although recent deregulation decisions have allowed licensees more flexibility as to how these requirements are met, the basic statutory obligations underlying them have not changed. In this respect, NAB quotes the Commission's statement in the *Report and Order* in the TV deregulation proceeding that each commercial television station continues to be "subject to an obligation to provide programming that is responsive to the issues confronting its community."[54]

31. Broadcasters view must carry rules as a means by which the Commission acted to preserve and to foster the localism concept and its associated local public service objectives. According to the NAB, in the early days of the cable industry, the Commission recognized the potential of cable systems to interfere with its television allocations scheme, and to advance or hinder the implementation of its localism policy. NAB submits that the Commission recognized the technical capability of cable systems to provide service to areas that had no off-the-air reception due to terrain problems and the fact that cable would be available only to those willing or able to pay for it. It states that the Commission asserted jurisdiction over cable to preserve and continue the growth of the local television system. The United States Catholic Conference (Catholic Conference) also points out that Congress assumed the continued existence of the must carry rules and reaffirmed the principle that local communities should be able to receive locally-oriented broadcast programming when it enacted the Cable Act. Finally, numerous broadcasting interests comment that the Quincy decision in no way altered the Com-

---

[54] *See Report and Order* in MM Docket No. 83-670, 49 FR 33588.

mission's statutory obligation to establish, foster, and maintain a locally-oriented broadcast system.

32. Senator John C. Danforth, in a letter to the Commission dated July 22, 1986, submits that cable's ability to perform gatekeeper functions conflicts with three long-standing substantial government interests. He states that these interests are the public's First Amendment right of access to diverse sources of information, the preservation of vigorous competition among communications services, and the Commission's statutory obligation to promote a nationwide broadcasting service built upon local outlets.

33. Most commenters opposed to new must carry rules do not dispute the government's interest in localism, although some point out that the *Quincy* court assumed, without deciding, that the goal of encouraging localism qualifies as important or substantial under the standard enunciated in *United States v. O' Brien (O'Brien).*[55] However, parties representing cable interests argue that the factors underlying the federal interest in must carry regulation have changed and that to continue policies that further localism through signal carriage regulation will not necessarily further the public interest. In statements generally representative of these parties, NCTA argues that the Commission's responsibility under the Communications Act is not simply to foster localism, but rather is to promote the efficient distribution of service. It, therefore, submits that the Commission should base its decision in the must carry matter on the impact of that action on the development of a television system that maximizes access to the marketplace of ideas. NCTA asserts that must carry regulation is not warranted under this standard. In arguing this point, NCTA contends that the nature of cable television has changed significantly in recent years. It states that virtually all cable systems now offer their sub-

---

[55] 391 U.S. 367 (1968).

scribers a multitude of video programming options in addition to retransmitting broadcast signals and that as a result, cable television is no longer regarded as merely ancillary to broadcasting. On this basis, NCTA states that cable provides an independent voice and that this has been recognized by The court in *Quincy*. It further submits that in the Cable Act, Congress recognized the importance of the cable industry as a participant in the national communications system.

34. Several commenters submit that many cable systems now provide their own independent local programming. In particular, the Connecticut Cable TV Association (Connecticut Cable) indicates that The cable systems in its state often provide more local programming Than broadcast stations, Connecticut Cable further contends that nearby out-of-state stations that have must carry status generally do not provide programming directed to the local Connecticut population it serves.

35. A number of cable parties contend that the Commission's interest in protecting local television is no longer relevant in view of its decision to eliminate the television programming guidelines in the *Report and Order* in the TV deregulation proceeding.[56] NCTA, nineteen cable operators filing joint comments (Nineteen Cable Operators), and others observe that although the Commission has not completely abandoned its policy that all broadcasters should be responsive to local needs and interests, it has eliminated virtually all of the specific programming guidelines for broadcasters on the ground that market forces, including competition from cable, provide an adequate incentive for broadcasters to meet the needs of their audiences. The Nineteen Cable Operators observe that a commercial broadcaster, exercising its good faith judgment, is now free to present no local news or public affairs program-

---

[56] *See Report and Order* in MM Docket No. 83-670, *supra*.

ming.[57] It states that under these circumstances it seems incongruous for broadcasters to claim a federally-mandated right to displace the local programming which is being provided by cable systems. The Nineteen Cable Operators argue that the fact that local news, public affairs, or any other form of local programming is now totally discretionary with a television licensee undercuts the localism rationale for the must carry rules. Similarly, the Community Antenna Television Association (CATA) argues that the concept of localism is suspect absent a newly articulated definition of what it is, what it is intended to accomplish, and what a broadcast station must do To qualify under the new definition. Tele-Communications, Inc. (TCI) states that ensuring that the maximum diversity of information is available to the public by cable is more important than the substantiality of the government's interest in local broadcasting.

**Comments Concerning the Need for Regulation**

36. Commenting broadcasters generally believe that the Commission's localism policy will be threatened in the absence of must carry rules. They generally submit that they would lose audience without cable carriage and that the resulting lower revenues would pose a threat to the viability and existence of many stations. Broadcasters submit that must carry rules are needed to protect the free, over-the-air television system from this impact. The City of Boston stresses that it is important to protect local broadcast television stations because they are still the primary source of local news, public affairs, and other information

---

[57] *See Report and Order* in MM Docket No. 19142, 96 FCC 2d 634 (1984), *aff'd sub nom, Action for Children's Television v. FCC*, 756 F.2d 899 (D.C. Cir. 1985).

programming.[58] Broadcasters also contend that the potential for harm is great now because nearly half of the nation's TV households are dependent on cable for delivery of their television service.

37. Press Broadcasting Company and several others question the value of the requirement for local stations to present issue-responsive programming if the audiences those programs are intended for will not be readily able to receive them. In this respect, Cape Video Network contends that cable operators should shoulder part of the burden to foster localism through a requirement to carry local signals.

38. Several broadcasting interests contend that cable operators will be able to exert extensive power over the local broadcasters if they are not subject to must carry rules. Broadcasters assert that cable operators are typically monopolists within their service areas and can act as "gatekeepers," deciding which broadcast stations, if any, are carried by their systems. They argue that cable operators, by using this advantage, can prevent local stations from reaching the audiences they are licensed to serve, Tribune Broadcasting (Tribune) argues that without must carry requirements a local broadcaster's access to its service area will be subject to the whim of the cable operator, who is a competitor, Senator Danforth, in his July 22, 1986, letter states that there are two characteristics of cable that justify mandatory carriage requirements: first, that viewers may need cable service to receive local broadcast signals and; second, that most cable systems have a monopoly in their franchise area.

39. A number of broadcast interests express concern that cable operators consider local independent stations to

---

[58] The City of Boston comments that cable carriage of the eleven local stations in the Boston area would provide in excess of 100 hours of local news and public affairs programming each week to cable subscribers.

be undesirable inputs to cable service even if the stations' signals are popular with subscribers and the cable systems have channel space available. These parties, particularly INTV, allege that this attitude arises because cable operators consider independent stations to be competitors in the local advertising market. They contend that a cable operator will desire to keep the signals of local independent stations off its cable system so that local advertisers will be induced to buy time on the cable system's own channels. Broadcasters also argue that some cable operators hope to drive the local independent stations off the air in an attempt both to raise local advertising rates and to force local advertisers to buy time on their cable systems' program services.

40. Numerous parties, representing several classes of broadcast stations, fear that their stations would not be carried by cable systems without mandatory carriage rules. These commenters principally include licensees of: 1) new UHF independents; 2) UHF network affiliates in markets where more than one station is affiliated with the same network; 3) smaller market UHF stations; 4) minority owned and operated stations; and, 5) public broadcasting stations. In general, these broadcaster claim that without cable carriage they will be unable to reach the audiences they are licensed to serve and will be competitively disadvantaged against other local broadcasters. UHF broadcasters state that they are more dependent than VHF stations on cable carriage due to the reception problems that are inherent to UHF signals. Several new stations that anticipated cable carriage when they began operation claim that they are already experiencing difficulty in obtaining cable carriage, are being carried on tiers other than basic service, or are being required to pay for cable carriage. Some of these commenters believe that cable operators have an incentive to keep new stations off the air. In this respect, they point out that cable penetration and demand for pay services are highest where there are few

local stations and that cable operators now compete with broadcasters for local advertising.

41. According to the NAB, absent assured cable carriage, new stations in particular are caught in a "vicious financial vise." NAB and other commenters state that without mandatory carriage rights, new stations will not have access to cable households that represent a substantial portion of their potential audiences. They claim that this loss of audience will impair the ability of new stations to generate revenues that are needed to purchase and produce quality programming. These parties state that without such programming, new stations cannot attract the audiences that would indicate subscriber demand for their services and earn them the cable carriage afforded more established stations.

42. Minority and public broadcasters comment that non-carriage of their stations will deny their audiences access to the diverse programming they offer. Howard University, *et al.*, asserts that cable subscribers will not have the opportunity to be exposed to minority programming if minority-oriented stations are denied carriage. In its view, this would be an infringement on the First Amendment rights of minority broadcasters. Spanish International Network (SIN), *et al.*, licensees of Spanish language stations, state that a cable operator's decision not to carry one of their stations would deprive Spanish-speaking viewers of the unique ethnic-oriented programming that reflects their nondominant cultural identity and is in many cases the only programming these viewers can understand.

43. Public broadcasting commenters note that congress and the Commission historically have established policies that encourage the development of independent, local public television stations to provide alternatives to mass appeal programming, to serve neglected and undeserved audiences, and to respond to community needs. CPB and the other commenting public broadcasting interests believe that

in the absence of must carry rules their stations will not be carried by cable operators, especially in areas where there is more than one such station.[59] They contend that the resulting loss of audience will lead to a loss of financial support that will weaken the public broadcasting system as a whole and thwart their mandate to provide diverse programming.

44. Sixteen parties,[60] representing UHF stations generally of the classes claiming they are at greatest risk, describe instances Wherein they have been disadvantaged by the invalidation of the must carry rules. Specific situations described by these parties include requests for payment for signal carriage, refusals to carry a station's signal, and discontinuances of signal carriage. In general, these commenters believe that absent any must carry rules, they will not continue to receive the same quality cable carriage that they have had in the past and will thereby be disadvantaged in the competitive media environment.

45. Broadcasting interests argue that there is no satisfactory means of preserving localism if cable operators are not required to carry all local broadcast stations. They state that the often suggested option that cable subscribers could use an A/B switch and an antenna to obtain access to local signals that are not available on their cable systems is not a viable alternative.[61] In this respect, they state that subscribers are not likely to go to the trouble and expense necessary to receive those local signals that

---

[59] In its reply comments, CPB explains that multiple public stations in a market are not like duplicating commercial network affiliates. CPB states that public stations do not provide duplicated programming, but offer unique and distinct services to discrete audiences or offer viewers programs at different times.

[60] Nine television stations filed comments claiming that they are especially at risk in the absence of must carry rules. In its comments, INTV reports seven additional stations that claim to be threatened.

[61] *See* footnote 18, *supra.*

are not carried on cable. Broadcasters further contend that in many locations there is not acceptable over-the-air reception, especially for UHF stations, and that cable delivery is the only practical means for receiving local broadcast signals in such areas. In addition to the concerns about A/B switches reported in the comments, INTV elsewhere argues that these devices are not a solution to the must carry matter.[62] In particular, INTV adds that cable companies routinely volunteer to remove antennas from new subscribers' homes and that to deny carriage to local stations that are most competitive with cable services where cable operators sell local advertising will tend to perpetuate network domination of the television industry.

46. The NAB submitted a study, prepared under its auspices by the ELRA Group, Inc., that examined the extent to which cable subscribers can view local, off-the-air signals without benefit of cable carriage. Based on a sample of 610 cable households, This nationwide study of cable households found that: 1) very few cable subscribers currently have an outdoor antenna and an A/B switch; 2) most cable homes do not have roof top antennas connected to their cable sets: and, 3) a significant number of subscribers may not be able to have an outdoor antenna because of restrictive local regulations prohibiting antennas.[63]

---

[62] "The A/B Switch: A Non-solution to Must Carry", INTV, cited in "Broadcasting", June 23, 1986, at 75-76.

[63] The ELRA study's principal findings include:

1) One percent of cable subscribers now have an outdoor antenna and an A/B switch;

2) Two percent of cable homes use rooftop antennas in connection with their cabled television receivers;

3) Over half of cable households have never had an outdoor antenna:

4) About half of the cable subscribers who ever had a rooftop antenna

The ELRA study estimates that the cost to cable subscribers to obtain off-the-air reception capability could range from $458 million to $863 million. NAB states that these findings indicate that in the absence of must carry rules, cable subscribers could be forced to spend hundreds of millions of dollars on outdoor antennas, A/B switches, and switch installations and still would not have full assurance of being able to view local television signals, NAB also believes that ELRA's cost estimates are conservative and that the actual cost to cable subscribers could be as high as $1.6 billion.

47. NAB also submitted a statement describing technical problems associated with the use of A/B switches to enable viewers to switch from cable to off-the-air reception. Its analysis determines that this approach appears costly, complicated, and inconvenient to viewers. In particular, NAB concludes that: 1) an A/B switch must be connected to a properly maintained antenna to be effective; 2) installation of The Switch and/or antenna may require professional help; 3) installation becomes more complicated and may require additional equipment if a VCR is involved.[64] 4) the currently available A/B switches do not have a remote control feature; 5) cable-ready television sets will not receive UHF signals off-the-air in the cable mode;[65] and, 6) some A/B switches can increase signal leakage.

---

have taken it down;

5) Over forty percent of those who removed their antennas took them down because of their belief that cable service made them unnecessary;

6) Almost one-third of cable subscribers were told by their cable system that they would no longer need a rooftop antenna; and,

7) Almost two-thirds of all cable subscribers said that better reception was a principal reason for subscribing to cable service.

[64] The ELRA study indicated that one-third of cable homes now have VCRs.

[65] Cable service generally connects to the VHF antenna terminals of

48. The broadcast interests commenting on the compulsory copyright license state that it is a government intrusion into private negotiations for the use of copyrighted material. They state that the compulsory license is unfair because local television stations have always been required to bargain in the market for every television program they seek to exhibit, while cable television operators have been free to carry television broadcast programming at no charge for local retransmissions and at lower than market rates for distant signals. Furthermore, they State that since 1980, cable operators have been able to disregard the copyright exclusivity paid for by the local broadcast station purchaser of a syndicated television program by importing a distant station's transmission of the same program. They note that before *Quincy*, these was the countervailing consideration that the local station could at least be assured that its programming would be available to all television viewers in its home market, both over the air and on cable. Commenting broadcasters argue that the *Quincy* court was incorrect in determining that the must carry rules were simply a referential aid in the determination of the royalty fee and that, in fact, the must carry rules were intended, in part, to balance the benefit provided to cable systems by the compulsory license.

49. The government parties commenting on the compulsory license are in full agreement that it is an over-regulatory mechanism that grossly distorts the efficient development of a truly competitive video market. The National Telecommunications and Information Administration (NTIA) states, and the Department of Justice (DOJ) concurs, that the compulsory license tends to discourage the production of additional, innovative programming. They be-

---

TV receivers and, therefore? does not affect the use of the receivers' separate UHF antenna terminals. Thus, reception of UHF signals generally does not require use of an A/B switch, except in those cases where the receiver's cable ready feature operates in a manner such that its use disables the UHF antenna input terminal.

lieve that by artificially depressing the price paid by the cable industry for television broadcast signals, the compulsory licensing system encourages cable systems to retransmit more signals than they otherwise would. Thus, they argue that the compulsory license system serves to limit the realization of the full potential of cable television as a program distribution medium and as an alternative source of independently produced programming. The government parties state that the compulsory licensing scheme constitutes an irrational government-granted subsidy for one segment of the mass media industry. They further submit that compulsory licensing is manifestly unfair because it denies program producers the right to control the distribution and price of their product. Thus, they are concerned That the flow of investment into the programming industry may be affected. The Federal Trade Commission (FTC) argues that it is most likely that the government determined rates are incorrect and, thus, the rate-setting and royalty distribution mechanisms of the compulsory license may have led to a tendency toward reduction in the variety of programming available to consumers.

50. The government parties also agree that there appear to be few, if any, public interest benefits accruing from the compulsory license. The government parties state that a free market environment would not mean the end of the distant signal carriage market. They note that a number of satellite program distributors have come into existence in the unregulated market and act as intermediaries between copyright holders and cable operators. The government parties state that cable operators do not deal with the copyright holders of each program appearing on the satellite service, but rather deal with the program distributor who serves as an intermediary. Thus, they believe that an unregulated market in distant signal programming would quickly spawn the development of private institutions to broker the sale of distant signal programming to cable operators.

51. Finally, NTIA agrees with the broadcast parties that the vacated must carry rules and the compulsory license statute are necessarily linked together. They state that "[w]ith the court's elimination of the FCC's 'must carry' rules, the right of zero-cost access previously enjoyed by local broadcasters to local cable systems dissipates." NTIA argues that if cable systems are now to enjoy the right to pick and choose among local broadcast signals, any rationale for granting the cable industry, in effect, an exemption from the ordinary workings of the copyright laws also is vitiated.

52. Cable interests generally refute the contention that signal carriage regulation is necessary to preserve the Commission's localism policy. Cable commenters contend that even if it is determined that broadcast programming deserves special treatment because of its local nature, there is no evidence that audiences will be deprived of access to broadcast stations in the absence of mandatory carriage rules. In statements representative of these interests. NCTA states that cable operators have an economic incentive to provide locally-oriented programming because they operate in a highly competitive market and can ill afford to be insensitive to the requirements of their subscribers. NCTA observes that according to recent audience surveys, local broadcast signals still attract a major share of cable audiences.[66] It argues that cable operators, therefore, have an economic incentive to continue to carry these local broadcast signals because they are popular with subscribers. Cable parties claim that the loss of guaranteed cable carriage is likely to have only a slight effect on local broadcasters. They contend that if the service broadcasters

---

[66] For example, in its comments, NCTA cites a recent survey that indicates that broadcast stations, "excluding superstations," received more than 70 percent of the audience in cable households during the first nine months of 1985. Cable Television Advertising Bureau, *Cable Market Update*, 1985.

provide is truly local and desired by cable subscribers, then viewers who wish to receive that service will be able to do so by using off-the-air reception capability. The National Telephone Cooperative Association comments that the must carry rules tended to protect local broadcasters and not local broadcasting.

53. Cable interests generally argue that there is no evidence of need for regulation to protect local broadcasting. The cable and citizens' groups submitting comments opposing new must carry rules state that the performance of the cable industry post- *Quincy* provides convincing evidence that cable companies generally have not dropped the local broadcast signals that they had been carrying before the *Quincy* decision. They point out that there are no "dead bodies" on the landscape. These commenters also state that most broadcast stations will continue to be carried in the future because cable must satisfy subscriber preferences, which include broadcast television.

54. The staff of the FTC submitted an empirical study which indicates that, absent must carry rules, cable systems can be expected to carry many or most local broadcast stations. The FTC study evaluates the local broadcast signals carried by satellite master antenna television (SMATV) systems. SMATVs differ from conventional cable systems only in that they tend to serve buildings with multiple dwelling units and are not subject to the must carry rules. Thus, the FTC staff believes that an analysis of the behavior of SMATVs with respect to local broadcast signals should provide the Commission with a strong indication of the likely behavior of cable systems in the absence of must carry regulations. Their study of 24 SMATV systems reveals that carriage of local stations appears to be profitable and that local stations occupy on average almost half of the available channels on the systems. The FTC staff also examines how the proportion of local stations carried by SMATVs varies with the number of local broadcast stations and the number of available

satellite programming services. This analysis indicates that: 1) an increase in the number of local stations is associated with an increase in the number of local stations carried by a SMATV, but the increase in local stations carried is lower than the increase in local stations—i.e., not all additional local stations are carried; and, 2) an increase in the availability of satellite services tends to reduce carriage of local stations. Based on this study, the FTC staff predicts that, absent a must carry rule, more than half of the local broadcast stations will be carried on cable systems and, in most cases, the proportion could be expected to exceed one-half by a large margin.

55. DOJ also does to believe that must carry rules are necessary to preserve and foster localism. In DOJ's view, the Commission cannot justify a need for must carry rules to further localism without demonstrating that the competitive marketplace will not ensure a desirable level of local television service. DOJ further states that the Commission has never maintained that the protection of all local broadcasters is necessary to foster the goal of a national broadcasting system. It submits that the possibility that some marginal individual broadcast stations may not survive without mandatory carriage rules is not a sufficient reason to reimpose such rules to preserve localism. DOJ further states that under *Quincy* the Commission may not reimpose must carry rules without first defining, in objective terms, the minimum amount of local broadcasting necessary to serve the public interest, and then demonstrating that absent regulation, local broadcasting would be reduced below that minimum.

56. Parties representing cable interests generally contend that the adoption of new must carry rules would limit rather than promote program diversity. In this respect, the Nineteen Cable Operators state that must carry rules displace cable programmers' only means to reach their audience, in favor of television broadcasters who have an alternative delivery mechanism to reach the public. They

also submit that mandatory carriage rules do not prevent unfair competition because cable carriage alters the over-the-air competitive situation between broadcasters in a given market. Cable operators argue that must carry rules give broadcasters an unfair advantage over cable programmers who are not provided a similar guaranteed means of reaching their audience. Finally, Nineteen Cable Operators state that must carry regulations unfairly hamper cable operators who must compete with alternative video entertainment delivery systems which have no similar mandatory carriage requirements.

57. Several operators of cable programming services state that any must carry rules will preclude them from providing valuable and unique non-broadcast programming to their subscribers. TBS, the Eternal Word Television Network (EWTN), and others contend that cable channel capacity is generally limited, and that must carry requirements further limit the number of channels available for cable programming services.[67] EWTN contends that the proliferation of new UHF stations burdens cable systems and forecloses entry for new cable networks. Tele-Communications, Inc. (TCI) asserts That mandatory carriage rules impede the Cable Act's stated purpose of ensuring diversity on cable.

58. Proponents of the compulsory license contend that a "free market" in the distribution of distant signal programming would ensure the virtual elimination of a distant signal market. This argument is based upon the assumption that the costs to cable operators of negotiating, monitoring, and enforcing contracts with each and every program producer regarding each and every program exhibited on a distant signal would be prohibitively high.

---

[67] For example, TBS notes that despite the publicity given to a few new cable systems with 50-100 channels, over 38.7 percent of all systems have 20 or fewer channels and 12.4 percent of all systems have 12 or fewer channels.

Cable operators claim that by eliminating the need for costly individual contracts, the compulsory license statute renders the existence of a distant signal market possible. NCTA, in its comments on the compulsory license, states that Congress did not see any connection between the compulsory license and mandatory local carriage. NCTA further states that the compulsory license reflects its agreement with the Motion Picture Association of America (MPAA), in which broadcasters played no part of record.

**Proposals**

59. In the *Notice,* we requested comment on the proposals filed by INTV and the public broadcasters and the concerns raised by the NAB. Interested parties were also invited to submit other specific proposals that would meet the constitutional concerns raised by the court in *Quincy.* In addition, we requested comment on the impact of these issues on the compulsory licensing scheme and our authority in this area. In the subsequent *Order,* we invited comment on the industry agreement and the more general question of whether local broadcast service and the concept of localism as a communications policy are sufficiently important to warrant an intrusion on cable operators' First Amendment rights.

60. The *INTV Permissible Signal Carriage Rule Proposal.* In the *Notice* we indicated our intention to examine the communications policy implications of cable's compulsory copyright license in light of the *Quincy* decision. In this regard, we requested comments on the permissible signal carriage rule proposed by INTV. Under this proposal, the cable operator would choose either to invoke the compulsory copyright license by carrying all signals considered "local" under the rule, or to negotiate separately with copyright holders for use of their work. The proposed rule is based on Section 111 of the Copyright

Revision Act of 1976 (Copyright Act).[68] It provides: Cable Television carriage of television broadcast signals is permissible, for purposes of Section 111 (c) of the United States Code, if the cable system carries, as part of the basic tier of cable service regularly provided to all subscribers at the minimum charge, the entire signals of all local television broadcast stations without discrimination or charge. A television broadcast station is "local" as to a cable system if the cable system lies within the "local service area" of the television station, as defined in 17 U.S.C. Section 111(f).[69]

We solicited comments on the Commission's authority to adopt INTV's proposed rule and whether this proposal meets the constitutional concerns raised by the *Quincy* court.

61. Fifty-five of the commenting parties address INTV's proposal. About half of these commenters are broadcasters who support the proposal as a viable means to restore balance to the cable-copyright market. Some of these broadcasters would prefer new must carry rules, but consider this proposal an acceptable alternative. Some commenters suggest modifications to the rule proposed by INTV.

62. In its comments, INTV states that the proposed rule is a pragmatic solution to the market imbalance created by *Quincy* between cable's retransmission of broadcast television signals and the compulsory copyright license. INTV contends that the proposal is not for a must carry rule, but rather a "may carry" rule that would affect only a

---

[68] Copyright Revision Act of 1976, 17 U.S.C. §111.

[69] Section 111(f) states in pertinent part: "The local service area of a primary transmitter in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976."

cable operator's method of payment for the right to retransmit broadcast television programming. If further submits that the proposed "may carry" rule is constitutional and the Commission has the authority to adopt it.

63. INTV states that the Commission's authority to adopt the proposed rule is derived from the "plain meaning" of Section 111(c)(1) of the Copyright Act, which makes cable systems eligible for compulsory licensing "where the carriage of the signals comprising the secondary transmission is permissible" under the Commission's rules. INTV states that the legislative history of the Copyright Act demonstrates an inherent and inextricable legal tie between the must carry rules and the compulsory license. INTV states that in their 1971 "Consensus Agreement," broadcasters, cable operators and program copyright owners agreed to support both local carriage rules and the compulsory licensing scheme. Many commenters supporting the proposal endorse INTV's rationale or proffer similar arguments regarding the Commission's authority. Other supporters assume the Commission's jurisdiction without discussion.

64. INTV states that its proposal is constitutional because it is a "may carry" rule that would not require or prohibit carriage of any or all television signals. Therefore, it states that the proposed rule would not infringe cable operators' First Amendment rights and, thus, would not even be subject to constitutional scrutiny. INTV also contends that it is constitutional to condition a cable operator's eligibility for compulsory licensing on its carriage of all local television signals. In this regard, INTV states that copyright is a constitutionally authorized protection, but that the compulsory license is a statutory benefit to which there is no constitutional right. INTV and some commenters argue that the proposed rule would not infringe on a cable operator's First Amendment rights and that the Commission's authority under Section 111(c)(1) of the Copyright Act includes the power to condition eligibility for

the statutory benefit of the compulsory license. Overall, the proponents generally agree with INTV that the proposed rule is constitutional under *Quincy*.

65. Cable interests, DOJ, NTIA and the FTC oppose INTV's proposal. These parties state that it would effectively force cable systems to carry all local television signals and, therefore, it is a form of reimposition of the must carry rules. Similarly, in DOJ's view "the proposal represents an effort to coax cable systems into carrying all local broadcast stations by threatening to withhold a privilege accorded by Congress." Cable interests favor maintaining the compulsory license in its current form. The FTC and NTIA state that the compulsory license should be repealed in favor of free markgtplace negotiations.

66. Opposing parties also state that the Commission does not have the authority to adopt INTV's proposal. They generally concur with DOJ, which states "[w]e do not believe that the Commission may avoid the limits on its ability to determine copyright policy by defining as impermissible, for purposes of Section 111, carriage that is permissible for communications purposes." Many commenters cite *Quincy* to support the position that the compulsory license is linked only to carriage of distant signals, for which the must carry rules in effect as of April 15, 1976, were "frozen" as a definitional reference to distinguish local from distant signals.[70] These commenters claim that invalidation of the must carry rules is irrelevant for copyright purposes and that new rules affecting local signals would not affect the compulsory license.

67. Opponents generally believe that INTV's proposal is an attempt to circumvent the *O'Brien* test. They contend that this proposal, therefore, raises substantial First Amendment concerns. For example, many of the oppo-

---

[70] *See Quincy, supra* at 1454 n. 42.

nents state that the commercial impracticability of separate copyright negotiations will force cable operators to carry all local television signals in order to avail themselves of the compulsory license. As a result, they argue, INTV's proposal relates to program content and, thus, is subject to constitutional scrutiny. Opponents also contend that this proposal is unconstitutional because only Congress, and not the Commission, may legitimately attach conditions to the government bestowed benefit of the compulsory license. Others argue that INTV's proposed rule would abridge cable operators' Fist Amendment rights by conditioning eligibility for compulsory licensing on the relinquishing of their editorial discretion.

68. *Proposals for Requiring Carriage of New Stations.* Several commenters express concern about the viability of new stations entering local television markets without the competitive equalizer of cable carriage. These parties believe that new stations which as of the *Quincy* decision either had not begun operations or captured the attention of their local television market audience or advertisers, will suffer the greatest competitive harm absent rules assuring them cable carriage. These commenters contend that unless new stations are protected, the nation's system of over-the-air broadcast television will be jeopardized. A few of these parties propose rules or suggestions designed To aid new stations. The consensus among these parties is that new stations should be carried by cable systems for a specified period of time. The time periods proposed for carriage of new stations vary from 18 months to five years.

69. Grace Cathedral, Incorporated (Grace) proposes to protect new stations using a copyright-based signal carriage rule. The proposed rule would condition availability of the compulsory license on the carriage of all "eligible" television stations, i.e., those licensed for fewer than five years and within whose specified zone the cable system lies in whole or in part. It would require carriage of the entire signals of all eligible new stations without discrim-

ination or charge on the cable system's basic tier of service until their period of eligibility has expired. The proposed rule would allow cable operators to elect not to use the compulsory copyright license and to "opt out" of the carriage requirements by complying with the requirements for providing written notice of the same to the Commission.

70. Grace argues that there is need for this form of regulation because cable poses an especially acute threat to new broadcast stations that have difficulty obtaining advertising revenue during their first few years of operation and cannot afford to pay for cable carriage. It asserts that the critical nature of cable access is heightened for new independents that have to compete with local network affiliates that are generally carried by cable systems.

71. In support of its proposed rule, Grace first states that it concurs with INTV's position that the Commission has authority to adopt a copyright-based signal carriage rule under Section 111(c) of the Copyright Act. Grace also asserts that its proposed rule is constitutional. In reply comments, it argues that its proposed rule is a content-neutral measure designed to promote the diversity of voices in the electronic media without unconstitutionally infringing on cable operators' First Amendment rights. In this regard, Grace contends that its proposed rule would not favor a particular point of view and would not discourage cable operators from carrying stations or from originating programming. Grace argues that its proposed rule meets the *Quincy* court's concerns respecting the overinclusiveness of local cable carriage rules. It states that the proposed rule would cure the problem under the previous must carry rules whereby protection was afforded indiscriminately to all broadcasters because it would apply only to new station licensees and only for as long as they reasonably need protection. Grace asserts that the five-year limitation would be a self-regulating device that would be responsive to local conditions since most stations have been

licensed for a longer period of time. It concludes that under its rule, if a station is able to fend for itself after five years, the local market would have an additional viewpoint, and if the station fails, the rule would have functioned properly by having given the new station a chance to succeed.

72. NCTA opposes Grace's proposed rule in part on the ground that the Commission does not have the authority to affect cable's compulsory copyright license. In this regard, it argues that Section 111(c) of the Copyright Act does not authorize the Commission to impose copyright-related conditions on the permissibility of cable carriage of broadcast signals. NCTA contends that if a signal may be retransmitted pursuant to the Commission's rules with respect to communications policy, then it is subject to compulsory licensing. NCTA also asserts that Grace's proposal ignores the *Quincy* court's concerns regarding cable operators' editorial discretion, viewer preferences and interests of non-broadcast cable programmers. It states that this proposal seeks only to protect the interests of individual broadcasters without regard to the economic viability of broadcasting in the particular market.

73. *Proposals for Requiring Carriage of Public Broadcasting Stations.* In the *Notice*, we requested comment on a proposal submitted by CPB and other public broadcasting interests that the Commission adopt a rule requiring carriage? except in limited circumstances, of the entire signal of all public television stations providing Grace B service to all or part of a cable system's community. The public broadcasters' proposal would not require carriage of public television stations that simultaneously broadcast the same programming carried by another public television station. In addition, cable systems with twelve or fewer channels would not be required to carry more than three local public television stations if the systems need channel capacity to carry programming from nonlocal sources. Finally, CPB's proposal requires carriage of the entire signal transmitted

by the station, including services carried on the vertical blanking interval (VBI) or on aural subcarriers.

74. In support of this proposal, CPB alleges that the loss of cable carriage would undermine the financial stability of individual public broadcasting stations as well as the entire national public television system. CPB argues that without cable carriage, local public television stations would find it more difficult, if not impossible, to reach significant portions of the audience on which they rely for support, CPB claims that virtually all public television stations are dependent for support upon viewer contributions and that such funds are the fastest growing source of public televisions' total revenues. CPB also states that viewer contributions are key to fundraising because they are subject to "matching" funds from other sources such as corporate foundations and legislative bodies. Thus, CPB asserts that without cable carriage public television station access to viewers would be restricted and viewer contributions would be reduced, thereby affecting the amount of revenue received from available "matching" funds. CPB further contends that the loss of local viewer support would jeopardize the entire public television system. In this regard, CPB points to the cooperative arrangement among public television stations for financing program production. CPB concludes that if individual public broadcasting stations are financially weakened or forced off the air, the quality and diversity of the programming offered by the system as a whole would be adversely affected.

75. CPB also claims that this proposal complies with the First Amendment requirements established by the court in *Quincy* by stating that mandatory carriage of public television stations furthers a substantial governmental interest and is narrowly tailored to protect that interest. It states that Congress and the Commission have longstanding public interest policies regarding the fostering of a nationwide public television service built on local stations and that public television stations, especially those in the

UHF band, rely on cable carriage to reach their audiences, CPB asserts that its proposal is the least restrictive means of furthering that governmental interest. It submits that this proposal would not require carriage of duplicative program services, but would foster diversity even in the relatively few situations where multiple public television stations must be carried. It states that this diversity in programming is the essence of public television's mission. CPB also claims that its proposal accommodates the First Amendment interest of cable operators by assuring that even the smallest systems have the opportunity to present programming from sources other than local public television stations. It further asserts that required carriage of VBI and aural subcarrier signals is necessary because these technologies permit public television to offer services designed to implement Congress' mandate that public television stations use their facilities to the extent feasible to generate added revenue. In its reply comments, CPB points out that with the exception of public broadcasters, none of the other commenters recognize public televisions' unique role or advance proposals that adequately protect the unique governmental interest in supporting the public television service. Thus, it argues that any of the proposals that would allow the market to determine which stations cable systems would carry are not appropriate.

76. Other commenters who support mandatory carriage of public television stations offer alternative proposals. The Catholic Conference suggests that in order to promote the important governmental interest in the public receipt of locally oriented programming, must carry rules should favor public television stations operating within the cable community. The Office of Communication, United Church of Christ, *et al*, (UCC) jointly propose mandatory carriage for at least one noncommercial station for cable systems within the top 100 markets. UCC's proposal would provide that if there is more than one noncommercial station, the one with the highest local audience would be carried. The

City of New York Municipal Broadcasting System (WYNC) opposes any rule that would limit carriage of public television stations on the ground that such stations provide duplicative programming. WYNC claims that such a ground would not be based upon fact and that any resulting rule would be contrary to the public interest.

77. In opposing the CPB proposal, the Financial News Network (FNN) indicates that prior to *Quincy*, cable systems in major metropolitan areas were required to carry two or more public television stations, many of which duplicated programming of other public stations. FNN claims that the effect of the CPB proposal is nothing more than the reimposition of the former must carry rules found constitutionally invalid in *Quincy*. NCTA echoes this position and points out that, in many instances, the carriage of duplicating noncommercial stations would actually injure the noncommercial station that is most local by diverting local audience contributions. The Nineteen Cable Operators state that the CPB proposal must be rejected since it does not even address the concerns in *Quincy* that must carry rules should be sensitive to factors such as channel capacity, duplicate programming, and the preferences of cable subscribers. The Nineteen Cable Operators also contend that CPB's general allegations of financial harm are totally unsupported and that CPB has, therefore, failed to prove that its proposal is necessary to further a substantial governmental interest and that no less restrictive alternatives are available. They further argue that CPB's claims of harm to public television stations notwithstanding, other alternatives to mandatory carriage exist to protect public broadcasters such as the construction of TV translator and low-power stations, which do not infringe upon The First Amendment right of cable operators. Accordingly, the Nineteen Cable Operators assert that CPB's proposal could not withstand constitutional scrutiny.

78. NAB would treat public television stations in the same manner as commercial stations. That is, cable sys-

tems would not be required to carry duplicate network affiliates (i.e., PBS) and the affiliate in closer proximity to the cable system would have preference. Several other commenters propose a minimum carriage rule that would require retransmission of at least one noncommercial educational station.

79. NTIA's proposal recommends that the Commission adopt a rule mandating that cable systems carry, without charge, the signals of all local nonduplicated noncommercial educational television stations, including translators. These signals would be carried in their entirety on the system's lowest priced tier. NTIA states that noncommercial stations play a unique and important role in providing instructional, educational and cultural programming generally not available on commercial stations.

80. Beyond mandating carriage for public television stations, NTIA believes that the Commission has an obligation to ensure a smooth transition from pervasive regulation to less intrusive market competition. NTIA recommends that the Commission institute a formal, continuing inquiry and fact-gathering process so that the Commission can accurately monitor and assess developments in the less regulated cable-broadcast environment. The Commission should issue interim reports of its findings on a yearly basis. At the end of three years, the Commission should make a formal determination of whether additional must carry rules are needed. In this regard, NTIA states that the Commission is not currently in the position to know whether mandatory carriage rules are needed to protect local broadcasting.

81. Finally, NTIA suggests that the Commission make clear that it would permit affected parties, including local franchising authorities, to demonstrate that a significant governmental interest would be adversely affected absent local must carry protection. It states that if such a showing is made, the Commission can adopt mandatory carriage

rules tailored to that individual marketplace. NTIA further states that a case-by-case review of the need for mandated carriage in an individual television market would enure that the public interest is protected.

82. *Input Selector Switch Proposal.* Richard S. Leghorn proposes two rules that he claims would protect viewers' capabilities to receive over-the-air television in homes that subscribe to cable.[71] The first rule would provide requirements respecting A/B switches and the second rule would establish "may carry" conditions for cable carriage of broadcast signals. Mr. Leghorn contends that these proposals would further the Commission's objectives and be less intrusive into protected First Amendment rights than any mandatory carriage rule.

83. In regard to A/B switches, Mr. Leghorn proposes requiring television set manufacturers to build input selector devices into the sets' channel control systems to permit easy selection between cable and off-the-air programming. In the absence of a manufacturer-provided switch, he would require cable operators to install A/B switches the subscriber homes at cost and would prohibit them from disconnecting UHF antennas. As a corollary to the first proposal, he suggests that cable operators be exempt from the requirement to provide A/B switches if their system carries all local unscrambled VHF signals. A signal would be "local" if its Grade B contour overlaps any part of the cable system's community unit. The second rule proposed by Mr. Leghorn would authorize able retransmission of broadcast signals if carriage is without charge to the licensee, except for reimbursement for costs incurred by the cable system for facilities used to receive the broadcast signal or copyright fees. Additionally, he proposes to require cable systems to carry authorized sig-

---

[71] Mr. Leghorn is a cable system owner and a former member of the board of directors of the National Cable Television Association.

nals in their entirety, without alteration or degradation and, if technically feasible, on the same channel number.

84. Mr. Leghorn contends that his proposed rules would ensure that subscribers have the opportunity to view off-the-air or cable programming. Thus, he believes that his proposal would meet the constitutional requirement that incidental governmental regulation of speech be narrowly tailored to meet the interests claimed to require that regulation.

85. NAB opposes the A/B switch proposal on the ground that such devices would not solve the problem of ensuring the availability of broadcast signals to television viewers. In this regard, it claims that in many instances off-the-air reception of broadcast signals is either nonexistent or, where existent, often cannot be received using an A/B switch without the use of substantial additional equipment that is owned by very few cable subscribers. NAB also raises several additional points to support its position that mandatory carriage rules are a solution preferable to A/B switches, including widespread local restrictions on outdoor antenna installation, receiver/switch incompatibility problems, radiation interference and pre-wiring of new homes for cable.

86. *Other Proposals.* CBS Inc. proposes a rebroadcast consent rule. The rule would permit secondary transmission of local or distant television signals by cable systems only upon written consent of the originating station. However, such authority would not be necessary with respect to local signals if the cable system carries all such signals in their entirety on the station's transmission channel, without charge or alteration. CBS states that inasmuch as teletext and multichannel sound are valuable enhancements to, and form an integral part of, main channel programming, the proposed secondary transmission rule would require transmission of these signals as part of the entire broadcast signal. CBS also proposes a conjunctive rule that

would allow cable systems to exclude the teletext, closed captioning and/or multichannel sound portions of the signal, if such retransmission would interfere with main channel programming, unless such interference can be remedied without a significant capital expenditure by the system. CBS asserts that the secondary transmission consent rule would promote competition and diversity in local and national markets and would effectuate the Commission's statutory responsibilities.

87. The Catholic Conference proposes a rule to protect stations which it asserts are at risk and which it believes merit carriage. This proposal Would require cable systems to carry stations that meet any of the following criteria: 1) the station devotes five percent or more of its programming for local interest or is locally originated; 2) the station is a public television station whose signal covers the community served by the cable system; 3) the station is a UHF station whose signal covers the community served by the cable system; or 4) the station is an independent commercial station whose signal covers the community served by the cable system. The Catholic Conference believes that these stations should be favored because they are likely to provide programming designed to meet the needs of the local community served by them and the cable system.

88. The Catholic Conference further espouses a point system for stations by which cable systems would be obliged to fill available channels. Points would be allocated as follows: 1) one point for every five percent of total programming that is locally oriented; 2) one point for a local public television station: 3) one point for a local UHF station; or, 4) one point for a local independent commercial station. The Catholic Conference would have stations annually submit their qualification point accumulations and appropriate documentation to the cable systems upon which they request carriage. The Catholic Conference would allow the cable operator to use its business judgment to

determine which station would be carried in the event two or more stations had the same point total and if the number of qualified stations exceed the number of must carry channels.

89. UCC proposes that cable systems in markets below the top 100 be required to carry all local stations, regardless of channel capacity. Under this proposal, local stations would be defined as those stations whose Grade A contour covered at least one-half the cable system's basic subscribers. UCC asserts that there are usually only a few, perhaps only one, such stations serving a cable community and that their carriage is crucial to people in the rural areas not served by the cable system. UCC believes that cable systems with limited channel capacity in the top 100 markets should be required to carry, in addition to at least one noncommercial station as discussed above:
1) any ethnic or minority-owned station serving a significant portion of the population reached by the cable system; 2) stations with more than 40 percent local programming directed to serving the needs and interests of the community; and 3) all UHF independent stations. It further argues that cable systems with larger capacity in the top 100 markets have incentive to carry all the programming they can obtain and that it is doubtful that there is any regulatory program that needs to be addressed. However, UCC states that the Commission would have full authority to intervene if problems arose with such systems.

90. Many commenters propose a geographic standard for defining "local" signals that cable systems would be required to carry. Most of these parties suggest a 50-mile zone using the city of license or transmitter location as a reference point. Other parties would require carriage of broadcast signals on all cable systems within their area of dominant influence (ADI). Some commenters propose requiring cable systems to carry any station whose Grade B contour overlaps the cable community. UCC suggests

that in markets below the top 100, cable systems must carry any signal whose Grade A contour encompasses at least one-half of the cable households. Lincoln Broadcasting, licensee of KSTF, would require carriage of all foreign language stations within 50 miles. Howard University and several others would require carriage of all local minority-owned stations.

91. Most of the commenters who support some sort of must carry rules would exempt those systems with twelve or fewer channels. Some parties would extend this exemption to systems with more than 12 channels if they have less than 1500 subscribers.

92. *The Industry Agreement.* The industry agreement requires cable systems with more than twenty usable activated channels to carry all qualified local stations, in their entirety, on the lowest priced tier.[72] However, this must carry obligation is subject to stated limitations based upon the number of usable activated channels carried by the cable system. Specifically, the proposal provides that systems with 21 to 26 usable activated channels are required to carry no more than seven qualified local stations. For systems with more than 26 usable activated channels, the proposal specifies that the number of channels subject to the mandatory carriage requirement shall not exceed 25 percent of the channels of the cable system. In situations where the number of qualified local stations is greater than the prescribed cap, the cable operator is given discretion to select among the stations qualified for mandatory carriage.

93. Under the industry proposal, a qualified local station is defined as a broadcast television station that is located

---

[72] The agreement defines "useable activated channels" as "those engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, less channels reserved against interference with aeronautical frequencies."

within 50 miles of the cable system[73] and that attracts an off-the-air audience that meets or exceeds a minimum viewing standard. To meet the viewing standard a station must receive at least a two percent share and five percent net weekly circulation in noncable homes by county.[74] Only domestically-licensed, primary, full power television stations which deliver a good quality signal to the cable system's principal headend are eligible for mandatory carry status.[75] The scope of the mandatory carriage obligation does not extend to signals contained in the vertical blanking interval. A cable system has the discretion to determine the channel position of the stations subject to mandatory carriage. In addition, it is not required to carry more than one qualified local station affiliated with the same commercial or public television network. However, the agreement specifies that if the system chooses to carry more than one station affiliated with the same network, it will not be subject to network nonduplication restrictions. In addition, a system is barred from charging for carriage for any nondistant signal that is covered by the

---

[73] The fifty mile requirement is computed by measuring from the principal cable headend to the reference point of the station's city of license.

[74] The industry agreement utilizes different viewership criteria for new and existing stations. To qualify for mandatory carriage status, an existing station is required to demonstrate, using independent professional audience surveys, that it has achieved the requisite audience share for the previous television survey season. This showing is made on the basis of audience surveys undertaken during a separate consecutive four-week period in each of the four quarters of that season (i.e., April-June, July-September, October-December, and January-March). A new station, in contrast, "may satisfy the viewership test by presenting survey evidence gathered by a recognized rating service" and will retain its status as a qualified station until survey data for its first full television survey season—which extends from April until March—are available.

[75] Low power TV stations, TV translators, and TV boosters do not qualify for mandatory carriage. In addition, television stations licensed by foreign governments are not entitled to mandatory carriage.

compulsory license, whether or not that signal is subject to the mandatory carriage obligation, although a qualified broadcast station will be permitted to reimburse a cable operator for either copyright costs or the costs associated with delivering a good quality signal.[76]

94. Of the parties responding to the Commission's request for comment on the joint agreement, approximately a dozen parties, mainly representing broadcasting interests, express support for the proposal, as submitted. However, among the parties that submitted the agreement, the degree of support varies. NAB, INTV, and TOC strongly support the must carry proposal. NCTA supports the agreement, but believes that the court will have to ultimately decide its constitutionality. CATA does not believe that any must carry rules can meet the standards set forth in the *Quincy* decision. However, CATA states that if the Commission believes that rules are needed, it supports this proposal as workable and acceptable to the affected industry groups. A few commenters, such as DOJ, TBS, and American Cable Publishers Institute (ACPI), oppose any form of mandatory carriage regulation, including the industry proposal. The majority of commenters fall into one of two categories. One group would support the industry proposal if it were modified to protect selected interest groups, as they suggest in their comments. A second group opposes the industry agreement because it does not provide sufficient protection for specified interest groups. Many of the commenters from both of these groups recommend that the Commission either adopt a modified version of the industry proposal or some alternative form of must carry rules. Finally, several commenters offer opinions on selected aspects of the industry agreement without expressing either support for, or opposition to, the proposal itself.

---

[76] In resolving disputes over the rules, the industry proposal specifies that the burden of demonstrating a right to mandatory carriage will be borne by the broadcast station.

95. In the *Order*, we requested comment on the industry agreement with emphasis on two specific issues. The first of these issues was the extent to which the parties submitting the industry agreement have been able to successfully incorporate into the agreement the specific interests of the various discrete groups involved. In particular, we indicated that we were interested in the impact of the agreement on broadcasters (noncommercial, commercial, VHF, UHF, new, established, general interest, and narrowcast stations), cable system operators, alternative users of cable channels, cable system subscribers, nonsubscribers and the public in general. Most of the commenters on this issue are broadcasters who believe that their stations will be harmed if the agreement is implemented.

96. Supporters of the industry agreement believe that it generally serves the interests of all parties by balancing the need to provide the public with free, over-the-air, local television service while preserving the maximum flexibility and discretion in cable programming for cable operators. These parties recognize that it is impossible to fully satisfy all interests, but submit that the agreement sets forth a framework for a healthy coexistence of cable and broadcast television that will result in an optimal variety of locally-oriented and other television service. They state that the industry agreement is fair to all types of broadcast stations because carriage rights are determined on a neutral, nondiscriminatory basis. These commenters further state that it protects the public interest by assuring that viewers will continue to receive local programming that is intended to meet community needs.

97. Numerous broadcasting interests assert that the industry agreement accommodates only the economic interests of established commercial broadcast licensees and cable systems. These commenters represent a substantial portion of the submissions the Commission received. They imply that if the specified interest is harmed, the public, both

cable subscribers and nonsubscribers, will be affected by the loss of some television service.

98. CPB and other public broadcasting interests, as well as numerous informal commenters, claim that the industry agreement does not recognize the substantial governmental interest in and commitment to a public broadcasting service that provides programming to a narrow audience group. In particular, the public broadcasting interests argue that the viewing standard is inappropriate and that the use of such a criterion for determining must carry eligibility would penalize local public broadcasting stations for fulfilling the very role that was envisioned for them.

99. Public broadcasters also believe that other elements of the industry proposal would dilute their carriage rights. They claim that their carriage rights would be limited by the use of a 50-mile zone. They submit that the area covered by such zones is often smaller than their Grade B service areas. CPB cites A.C. Nielsen data to indicate that 68 percent of all cable systems, serving 16 percent of all cable subscribers, would be exempt from any carriage requirements because they carry 20 or less channels. Public broadcasters also claim that they are likely to be denied cable carriage in the 47 markets with eight or more television stations, and 67 percent of all television households, if the cap on the maximum number of must carry channels is retained. Again, as in earlier comments, these parties point out that duplicative public broadcasting stations do not provide duplicative service in the same manner as network affiliates. Several of these commenters further state that the failure to require carriage of noncommercial translators and satellite services will undermine many state and regional public television systems that rely on them to overcome the technical difficulties of UHF transmission and extend their service to remote areas.

100. In order to remedy these perceived infirmities with the industry agreement, public broadcasting interests pres-

ent a variety of proposals that would guarantee mandatory carriage to some or all local public broadcasting stations. Among these proposals is the plan submitted by CPB in its initial comments, and supported here by the Ohio Educational Broadcasting Network, to require the carriage of all Grade B noncommercial educational stations on the basic tier. The Maryland Public Broadcasting Commission and NATPE International believe that the agreement should be modified o require carriage of at least one public television station. The Metropolitan Board of Education believes that all local public television stations should be entitled to mandatory carriage rights on all but the smallest systems. NTIA proposes the adoption of a must carry rule that mandates carriage of all nonduplicated noncommercial educational television stations, including translators, in their entirety on the lowest priced tier, but would not extend mandatory carriage to commercial stations.

101. Licensees of other types of broadcast stations that program for narrow interest groups, such as minority, specialty and religious stations, express concerns similar to those of the public broadcasters regarding their ability to attain carriage rights under the industry agreement. New stations also are concerned that they will be unable to qualify for cable carriage if the agreement is adopted. Some of these commenters argue that they will be hurt by the provisions of the industry agreement that place a cap on the maximum number of must carry signals and that exempt small systems from such requirements altogether. A number of these parties propose modifications to the industry agreement or propose their own must carry requirements to guarantee greater access for stations that appeal to smaller audiences. Among these is a proposal by the National Coalition for Minority Broadcasters (NCMB) that would require carriage of all religious, minority, specialty, and public broadcasting stations in addition to all nonduplicated commercial broadcast Stations. WNJU-TV Broadcasting Corporation believes that at least

one channel should be reserved for a specialty station. MPAA and several other commenters recommend that the small system exemption be lowered to include only truly saturated systems, i.e., those with 12 channels or less. The Grant Broadcasting System and several other suggest requirements for carriage of all new stations for a specified period of time ranging from two to five years similar to several of the proposals submitted in response to the *Notice*. Allen Broadcasting proposes that the cap on the maximum number of required must carry signals be raised or eliminated.

102. These interests also are concerned that the viewing standard will limit their ability to qualify for must carry rights. Several commenters propose alternatives to the proposed viewing standard. Allen Broadcasting contends that new stations should be carried from their commencement of operation until survey data for the first full television survey season are available, irrespective of the limits on must carry signals. The City of Boston proposes that the viewing standard be eliminated for public broadcasting and minority stations.

103. The industry agreement is also opposed by several network affiliates that are licensed to small markets that are near large markets. These stations believe that they will be denied carriage under the industry agreement because cable systems will prefer to carry the affiliates from the nearby larger market. They state that the provision in the industry agreement that exempts systems from carrying duplicating network affiliates ignores the fact that affiliation with the same network does not necessarily mean that there is an excessive amount of duplicated programming. These affiliates also submit that the exemption from must carry requirements for systems with 20 or less channels disproportionately affects small market signals because a high percentage of these systems are in markets ranked below 100.

104. The second issue addressed in the *Order* was the extent to which the agreement successfully addresses the relevant constitutional concerns raised in the *Quincy* decision. Supporters of the industry agreement contend that it is constitutional under the test applied in *Quincy* and is responsive to the court's concerns. They assert that it strikes a proper balance between the First Amendment rights of broadcaster and cable operators and that it also recognizes the interests of cable subscribers and programmers. These parties state that the Commission now has a sufficient record to support the adoption of these must carry rules.

105. According to its supporters, the industry agreement is narrowly tailored to preserve cable operators' editorial discretion and also to protect the goal of localism by ensuring the availability of a modicum of local television service. They argue that this proposal does not coerce the speech of cable operators. In this respect, they point out that it allows cable operators to select the qualified television stations they wish to carry when the number of qualified stations is greater than the number of channels set aside for must carry signals. In addition, they note that under the industry agreement, no mandatory carriage requirements are imposed on operators of small systems. They further argue that in any event, no cable system will be required to allocate more than one third of its channel capacity to must carry signals, and in most cases no more than twenty-five percent. Supporters argue that through these provisions the agreement is also responsive to the concern that cable programmers be afforded access to cable subscribers. These commenters contend that the industry proposal also gives consideration to the preferences of cable viewers since the viewership standard serves as a surrogate measure of viewer demand for a given station. Finally, they submit that by not requiring carriage of duplicative stations, channel capacity bgcomes available for nonbroadcast cable services desired by subscribers.

106. Many opposing commenters do not believe that the industry agreement is responsive to the court's concerns. These parties include some who argue for must carry rules, and others who oppose any mandatory carriage requirements. Many parties, especially those whose stations would not qualify for carriage if this proposal were adopted, argue that the proposed rules are not narrow enough because they protect established broadcasters, rather than those whose economic well-being is most at risk. Several of these commenters criticize the viewing standard. They argue that it discriminates against stations with the greatest public interest need for protection. Many view the proposed rules as less burdensome on cable operators' First Amendment rights than the old rules. However, they comment that the rules proposed in the industry agreement still infringe on these rights by restricting cable operators' programming decisions. These opposing commenters contend that the requirement that cable operators devote a specified number of channels to must carry signals is an intrusion on their editorial discretion because it precludes their carriage of other services. They argue that the industry agreement favors one class of speaker, broadcasters, over cable operators and cable programmers. Finally, some commenters contend that the constitutionality of these or any other must carry rules cannot be demonstrated because any mandatory carriage requirements would impose unnecessary restrictions on cable operators' First Amendment rights.

107. We turn next to the question of how well the industry agreement would serve the federal policy interests in the must carry matter. A substantial number of broadcast commenters believe that must carry rules are needed to sustain the important governmental interest in localism. However, some of these commenters do not agree that the industry agreement is the appropriate policy for the preservation of local television service. As was indicated above, several classes of broadcast stations fear that they would not qualify for carriage under the agreement and

their ability to serve the public through local television service would be severely curtailed.

108. Proponents of the industry agreement assert that it is consistent with the statutory framework of the Communications Act and would promote diversity of media voices and viewpoints in local television markets. They state that the industry agreement would assure that viewers will continue to have local signals available to them and that local stations will continue to be able to reach the communities they are licensed and required to serve. In their view, the industry agreement is intended to accomplish this end without unnecessary regulation, as is reflected in the market forces that would be the basis for qualification for carriage. They submit that, in this manner, the industry agreement would result in only minimal intrusion on the First Amendment rights of cable operators while protecting the availability of a modicum of local television service.

109. Parties also comment on other elements of the industry agreement. The first of these concerns is the proposed elimination of the network nonduplication rules. Meridian Communications Corporation, the only nonsigner of the agreement favoring this aspect of the proposal, states that the elimination of these cable rules would give cable operators greater discretion to carry signals of their choice and to avoid the overbreadth problem that the court found in the vacated rules. Several small market broadcasters comment that the elimination of this protection is likely to harm them. They state that the nonduplication rules have important benefits, foster localism, and are in the public interest. They claim that without these rules a few large market stations would be able to dominate smaller market affiliates, especially in the West. They also point out that the nonduplication rules were not invalidated by the *Quincy* decision and have no impact on cable operators First Amendment rights. These parties argue further that repeal of the network nonduplication rules is

beyond the scope of the *Notice* and a further rule making proceeding would have to be initiated if such action is contemplated.

110. The industry proposal also prohibits a cable system from accepting any payment for the carriage of a qualified broadcast signal except to defray copyright costs or costs associated with the delivery of a good quality signal. The Nineteen Cable Operators oppose this blanket prohibition against charging for cable carriage, especially for former must carry signals that would no longer qualify. They state that cable access is a valuable commodity which should be allocated according to the demands of free market forces to the greatest extent possible. Further, they believe that this ban goes against the leased access provisions of Section 612 of the Cable Act. Tribune supports the ban on payment since there is a possibility that cable operators would abuse their monopoly position in the marketplace and essentially create a system that assures must carry rights only for the rich.

111. The industry proposal does not require cable systems to carry any transmissions on the vertical blanking interval, such as teletext, or any other signal enhancements, including multichannel sound (MTS). Those commenting on this issue state that any must carry rules should not unconditionally permit a cable operator to strip these portions of the broadcast signals which are intended for all viewers. Additionally, CBS comments that the industry agreement, if adopted, should be amended to require on-channel carriage for viewer convenience.

112. Senator John C. Danforth, in his July 22, 1986, letter submits a proposal intended to follow the basic outline of the industry agreement. Senator Danforth's proposal differs from the industry agreement in several key respects. First, it would require that must carry rules apply only to cable systems that have no direct competition in the franchise area (i.e., "monopoly" cable systems) re-

gardless of channel capacity (i.e., must carry obligations apply to systems with fewer than 21 channels). Second, the proposal provides that cable systems subject to the rules would be required to devote one-third (33 percent) of their activated channel capacity to carriage of qualified local television stations, and to reserve one-quarter (25 percent) of their set-aside capacity for carriage of public television stations. Third, The proposal maintains the 50-mile zone/viewing standard test for determining commercial stations that qualify for must carry status, but would permit audience measurements to be conducted in noncable, cable, or all television homes, at the option of the local station.[77] Also, it would exempt public stations and commercial stations that have been on the air less than twelve months from the viewing standard, and would make eligible for mandatory carriage translators of public stations.[78]

113. Senator Danforth's proposal also includes several recommendations that concern subjects not addressed in the industry agreement. It would require cable systems to provide A/B switches, by sale or lease, upon request of the subscriber and would implement a narrowly applied waiver procedure for cable systems and local stations. The Senator also suggests that following implementation of must carry rules, the Commission monitor market developments, periodically report its findings to Congress, and

---

[77] According to Senator Danforth, permitting local stations to choose the method of audience measurement would minimize the ability of cable systems to drop stations that have significant viewing shares in cable homes, but have insignificant shares in noncable homes due to reception difficulties.

[78] Like the industry agreement, this proposal would not require carriage of duplicated public stations. A station would be considered nonduplicated if 50 percent or less of its average program week consists of the broadcasting of the same episode of a program by another local station within the same week, comparing schedules of the stations for the same seven day period, sign-on to sign-off.

from time to time reexamine the rules to determine whether changes are needed.

## DISCUSSION

### The Federal Interest

114. In recent years, there have been significant changes in the system for providing television service in the United States, particularly with respect to the role of cable television. As commenting cable interests and the court discuss, the cable industry has continued the process of developing new program services and sources that we observed in the *Economic Inquiry Report*. Through this process, the cable industry has evolved from a mere supplemental provider of programming to become more of a direct competitor with the broadcast television industry. In this respect, cable systems currently are the predominant means of distributing satellite-delivered program networks and premium program services to consumers.[79] Moreover, as indicated in the comments, many cable systems are now providing locally originated programming services. We further recognize that some systems are selling time to advertisers on non-broadcast program channels in order to generate revenue. Thus, the cable industry is now a full-fledged video service providing consumers with alternative programming choices that are competitive with the services of broadcast stations. In offering alternative program services to their subscribers, cable operators now function as independent media voices exercising broad editorial control over content.

---

[79] Satellite program services have increased rapidly since the development of satellite distribution technology. Today, at least 57 video, 11 text, and 11 audio channel satellite-delivered program services are operating. National Cable Television Association, *Satellite Services Report*, February 1986. The most widely available satellite programming services, Such as CNN, CBN Cable Network, ESPN, SIN Television Network, and USA Network, reach at least 30 million television households each. *Cablevision*, March 31, 1986, at 40.

115. In considering the federal interest in this matter, we observe that our statutory mandate under Sections 151 and 303(g) of the Communications Act is "to make available, so far as possible, to all the people of the United States, a rapid, efficient radio communications service" and "generally encourage the larger, more effective use of radio in the public interest."[80] In furtherance of this statutory mandate, we have consistently pursued policies intended to develop a nationwide television system that maximizes diversity and choice in television services. In recent years, the expansion of cable systems' channel capacity has provided the means for distributing a significantly increased number of program services to viewer households. This additional program delivery capacity has provided opportunities for new program services to develop. In particular, the increased channel capacity of cable systems has made possible the development of satellite-delivered cable networks and premium channels. We find that the introduction of these satellite services distributed by cable systems, and the expansion of cable service as a whole, is fully consistent with the traditional governmental interest in maximizing the choices of television programming available to viewers.

116. Our objective to maximize the program choices available to consumers, particularly through cable services, is now specifically part of our statutory mandate in the Communications Act. In this respect, Congress determined that diversity and competition should be the fundamental underpinnings of federal, state and local government regulation of cable services. This Congressional recognition of our policies, which is set forth in Section 601 of the Cable Act, endorses policies designed to ensure that "cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public" and to "promote competition in cable

---

[80] 47 U.S.C. §§ 151 and 303(g).

communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[81] The Congress has also expressed, in Section 307(b) of the Communications Act, its will that broadcasting signals be distributed "among the several states and communities" in a fair and equitable manner. The plan the Commission is adopting, as set forth below, contributes toward both statutory goals.

117. We also observe that the federal interest in ensuring access to program choices includes ensuring access to the service of noncommercial educational television stations. During the interim period under the new rules, we find that a particular rule provision for carriage of noncommercial stations is justified. In this respect, both Congress and the Commission have sought to establish a form of television service that is not subject to the same market forces as commercial broadcast and cable television. For example, in the *Sixth Report and Order on Television Assignments*, Docket Nos. 8736 and 8975, 41 FCC 148, the Commission recognized that noncommercial stations could not compete effectively with commercial stations and so reserved 242 television channels for noncommercial use.[82] Similarly, in enacting the Educational Facilities Act of 1962,[83] Congress provided funds for noncommercial television stations. Congress further affirmed and strengthened the goal of extending noncommercial television when it enacted the Public Broadcasting Act of 1967.[84] There-

---

[81] 47 U.S.C. §521.

[82] *See Sixth Report and Order on Television Assignments*, Docket Nos. 8736 and 8975, adopted April 11, 1952, 41 FCC 148.

[83] *See* Pub. L. No. 87-447, 76 Stat. 64 (1962); *see also* 47 U.S.C. §§396(a)(5) and (6).

[84] *See Pub. L. No. 90-129, 81 Stat. 365 (1967); see also* 47 U.S.C. §§396(a)(5) and (6). Congress affirmed and strengthened the goal of extending public television to as many people as possible in the Public Broadcasting Act of 1967. There, Congress stated that "it furthers the

fore, in order to ensure continued access to noncommercial television service during the interim period for consumers to gain the awareness and capability to receive television signals independently off-the-air, particular provisions of the interim regulatory plan described below pertain to the carriage of noncommercial stations. As with our general rules, we do not believe that signal carriage obligations for noncommercial stations beyond the interim period established today are warranted, given the input selector switch rules and consumer education program established herein.

118. In considering the must carry matter, we find that there are substantial and significant federal interests with respect to maximizing the video programming choices available to consumers. We find that these interests are of sufficient importance that they merit regulatory intervention to ensure viewer access to the maximum number of program choices available through cable and off-the-air broadcast television facilities. However, we recognize that regulations designed to ensure access to program choices also are likely to be intrusive on cable operators' editorial discretion and, therefore, we believe that any such regulations should be limited in both scope and duration to the minimum necessary to achieve the preservation of this access.

119. We observe that our assessment of the federal interest is premised on concerns that differ from those propounded by some of the supporters of the industry agreement; this assessment of the federal interest also is different from that relied upon by the Commission, i.e.

---

general welfare to encourage public broadcasting services," and that "it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will effectively make public broadcasting services available to all of the citizens of the United States" *See* Pub. L. No. 90-129, 81 Stat. 365 (1967); *see also* 47 U.S.C. §§396(a)(5) and (6).

Section 307(b), in initially adopting the former must carry rules.[85] However, after considering the changed structure of the overall video market resulting primarily from the emergence of the cable industry as a means for distributing new program services, we conclude that it is no longer appropriate or desirable to treat cable as an auxiliary video distribution service and to protect local broadcast television service from competition with cable service.[86] In this respect, we believe the public interest would be better served by a policy that maximizes program choices, rather than one that that protects one segment of the television industry by substantially limiting the ability of others to offer service to consumers. In general, we believe that it would not serve the interests of video consumers to maintain policies that favor any group of program service providers to the exclusion of other competing service providers, especially where such policies may hinder consumers' access to those competing program services. Our policy decision, as set forth below, is, therefore, designed to maximize the availability of program choices by competing providers both off-the-air and on cable.

120. We also are concerned that the First Amendment rights of cable operators not be abridged. In their earliest stage of development, cable systems served exclusively as passive retransmitters of broadcast signals. As cable systems have expanded their services to include programming from other sources, the editorial role of cable operators has grown accordingly. This editorial function whereby cable operators select and tailor their program mix to meet viewer interests or other objectives is akin to that performed by publishers of print media. Like the *Quincy* court, we recognize that concomitant with the expanding role of

---

[85] This is not to say that the regulatory plan we are adopting does not have the ancillary effect of furthering some of those interests, e.g., Section 307(b).

[86] *See First Report and Order, supra,* at 699.

cable systems in providing program services is the expansion of cable operators' editorial discretion which is protected by the First Amendment.[87] Thus, any regulations we may consider in furtherance of our maximizing programming choices and competition goals must be weighed in terms of their impact on cable operators' and cable programmers' First Amendment rights.

**The Need for Regulation**

121. The central issue in the must carry matter is the perception that cable systems may be able to preclude access by their subscribers to off-the-air broadcast signals. This perception derives not form any inherent characteristic of cable service, but rather from cable subscribers' current expectation that broadcast signals will always be available as part of their basic cable service. This expectation is a direct result of the former must carry rules, which, in fact, required cable systems to carry all available off-the-air broadcast television signals. The expectation that local broadcast signals will be carried by their cable system has caused many subscribers to perceive that there is no need to install or maintain the capability to receive broadcast signals off-the-air. Cable operators have evidently encouraged this view. However, the technology of cable service does not necessarily preclude the use of antennas and other equipment for independent off-the-air reception of television signals.

122. Therefore, as evidenced by data discussed below, when consumers subscribe to cable service, they tend to

---

[87] *See Quincy, supra* at 1453. In recent years, lower federal courts have also recognized that cable operators engage in activities protected by the First Amendment and some have subjected our cable rules to more rigorous First Amendment analysis. *See e.g., Tele - Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1336 (D.C. Cir. 1985); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1052-1057 (8th Cir. 1978), *aff'd* on other grounds, 440 U.S. 680 (1979).

disconnect, and in most cases dismantle, antennas used with existing receivers. From the data it is also apparent that where cable subscribers connect new state-of-the-art television receivers to cable service, they often also do not connect those receivers to antennas. In addition, under the former must carry rules, most cable subscribers were unfamiliar with, and indeed had no reason to be familiar with, an input selector device for choosing between cable and off-the-air broadcast service. As a result, most cable subscribers have come to perceive that their only means of access to off-the-air signals is through their cable service. This has led to the perception that cable has the power to function as a gatekeeper, determining which local broadcast signals will be available to the cable subscriber. Thus, we recognize that our former must carry rules have created a misperception on the part of cable subscribers which needs to be corrected before economic forces can be relied upon to achieve maximum diversity in program choices for the public.

123. Our review of the cable industry indicates that its development has progressed such that cable is now becoming a major factor nationwide. As shown on Table 1, cable service is now available to 76 percent of the television households nationwide and cable subscribership is now 47 percent nationwide. This contrasts with levels of homes passed and cable penetration of 44 percent and 19 percent respectively in 1979, when we last examined the economic relationship between cable and broadcast television. It also is expected that cable will continue to expand in the future. According to a recent study by Arthur D. Little, Inc., the number of cable households will increase to 48 million by 1990. Using International Communications Research's estimate that there will be 94 million TV households in 1990, this translates to 51 percent cable penetration by 1990. Table 2 shows that cable penetration is highest in smaller markets and that this pattern has re-

mained relatively stable over time and with increasing levels of cable penetration nationwide.

124. As revealed by the ELRA study submitted by NAB, it is plain that cable subscribers now generally have not installed or maintained the antennas and associated equipment necessary for satisfactory reception of broadcast signals off-the-air. In addition, other research indicates that the increased cable penetration in recent years has been accompanied by a decline in dependence on antennas for reception of television signals. This phenomenon is evidenced by the data in Table 3, which indicates decreases in the number of outdoor and indoor antenna sales of 35 percent and 26 percent respectively. While sales of antennas are declining, sales of cable-ready television receives that are intended primarily for use with cable service have tripled in the same period and now comprise 58 percent of the total TV receivers sold. Cable-ready television receiver growth is shown on Table 4.

125. From the above, it is plain that cable systems have sufficient reach to affect almost one-half of the potential audience for broadcast television service in communities nationwide, and that this reach is even greater in smaller markets. Also, the available information on antenna use and sales indicates that cable subscribers in general currently do not have the antennas in place to provide satisfactory reception of off-the-air broadcast stations that are not carried on their cable systems. Further, the data on TV receiver sales show that cable-ready sets now command more than one-half of the market and that the market for these receivers appears to be continuing to grow. We believe this information demonstrates a trend away from reliance on off-the-air reception of television signals. Thus, we find that the current misperceptions by subscribers and their resulting behavior, coupled with the growth of cable service nationwide, have produced the result that cable television systems have a perceived ability to affect access to broadcast television service by a substantial portion of

the population. We believe this perceived ability is likely to persist in the absence of a shift in subscriber awareness and practices with respect to maintenance of effective off-the-air reception capability.

126. Because cable subscribers have not perceived the need to maintain or install antennas and input selector switches, their access to off-the-air broadcast signals is limited to those carried by the cable system to which they subscribe. If We did not adopt interim must carry rules now, until our long-term regulatory plan to educate consumers on the need for independent access to off-the-air signals and to make input selector switches available takes hold, harm to The public interest would ensue. Subscribers would be disadvantaged by not being able to view broadcast signals dropped by their cable system. This harm would result even though cable systems do not create a barrier *per se* to use of antennas for receiving broadcast signals off-the-air. In this respect, the UHF antenna terminals of most currently used television receiver are not affected by connection of cable service, and the VHF antenna terminal can be used for off-the-air reception if the cable service is connected through an input selector switch.[88] Thus, it is subscribers' current misperception that it is not necessary to have direct off-the-air access to broadcast signals that impedes the ability of broadcast stations that are not carried on cable systems to compete for the attention of cable subscribers.

127. As indicated above, we believe that competitive market mechanisms generally are the most appropriate method for assuring that the interests of consumers are satisfied. In the instant case, the increased competition

---

[88] Cable ready receivers generally disable the UHF antenna terminals when used in the cable ready mode. Use of UHF antennas with such receivers would require the viewer to use the mode switch on the receiver to alternate between cable service and off-the-air UHF reception.

resulting from the emergence of independent cable programming benefits the public by providing additional viewing choices and by leading broadcasters, cable operators, and cable programmers to be more attentive to viewers' program interests and preferences. Competition, coupled with the additional program channels typically provided by cable systems, also helps promote the availability of a greater variety of programming from diverse sources. In this regard, an open, competitive market where there is potential for access by all suppliers of video program services should operate to provide the mix of programming and viewing choices that most effectively meets public demand. In addition, a competitive market would ensure that television services and facilities are provided at the lowest cost to all parties. We further note that a competitive market would promote these desirable industry performance results without governmental regulatory intervention.

128. We also recognize that a competitive market may not lead cable operators to carry all of the television signals that can be received off-the-air in their communities. But such a result furthers the public interest if cable systems are able to replace an off-the-air signal with a signal from another source for which their subscribers would have a greater preference. Moreover, so long as cable subscribers are aware that they can receive the signal off-the-air, their overall program choices are maximized. While cable systems and broadcast stations compete directly in many respects, they are also complementary in others and it is clear from the record that cable systems do have incentives to carry broadcast stations. Thus, in cases where a cable system chooses not to carry a particular broadcast station, it does not necessarily indicate a public harm, but may simply reflect the fact that there is not sufficient demand for the station by the system's subscribers to warrant carriage. This is particularly likely to be the case for limited channel capacity systems where there are strong

incentives to use the available channels for the most popular programming.

129. In this regard, we recognize that other program sources, such as the many satellite networks, make strong contributions toward satisfying the informational and entertainment needs of the public. We further observe that "cable satellite programming" as defined in Section 705 of the Cable Communications Policy Act of 1984,[89] is an important source of programming for many noncable subscribers, particularly in rural areas, through home satellite dish (HSD) facilities.[90] In view of the fact that satellite programmers' current primary means of access to viewers is through cable systems, the public's interest in satellite cable programming warrants recognition in our decision making process n the must carry matter.

130. An environment where consumers have maximum access to the available viewing choices, which our two-part regulatory program is designed to achieve, also contributes to the furtherance of the goals under our traditional interpretation of Section 307(b) of the Communications Act that television signals be distributed ". . . among the several States and communities." in a fair and equitable manner.[91] In this regard, we believe that the additional program sources that have flourished during the cable industry's

---

[89] 47 U.S.C. §705.

[90] Since the Commission deregulated receive-only earth stations in 1979, sales of HSDs have risen dramatically. An industry source indicates that 1,345,000 HSDs were in use by the end of 1985, representing 1.6 percent of television households in the United States. First Communications Group, *The Home Satellite State of the Industry Report, January, 1986, at 7, 15.* The HSD industry is currently facing a period of some uncertainty as many satellite programmers are implementing scrambling systems. The future of this industry and the ability of noncable subscribers to access satellite programming will depend in large part on the decisions of these programmers with respect to marketing their scrambled services.

[91] 47 U.S.C. §307(b).

growth, in particular the many satellite networks, contribute to this goal.

131. There is only limited direct evidence available concerning the behavior of cable systems in the absence of must carry regulation and the effects of such behavior on their subscribers' program choices. While cable systems generally have continued to carry those stations that are available off-the-air in their communities in the period since the *Quincy* decision, there is evidence in the record that some cable systems have ceased to carry individual broadcast stations, refused to carry new stations, and/or requested payment for carriage of stations. In this regard, the reports of the experiences of commercial and noncommercial stations with respect to carriage by cable systems, coupled with the information on cable subscribers' practices with respect to maintaining independent off-the-air reception capability, indicates that some cable subscribers currently may not have access to all of the broadcast signals available in their area. In considering the evidence of cable industry behavior in the absence of must carry rules, we are also aware that many cable operators thus far may have been hesitant to act as if there were no such rules in view of the appeal by the NAB and others of the *Quincy* decision and our pending rule making in this matter (and NCTA leaders have apparently suggested to members that they continue to carry local signals until this matter is settled).

132. We find the FTC study of SMATV signal carriage practices to be somewhat instructive in that, to the extent that SMATV systems and the economic environments in which they operate resemble the cable industry, it provides indication that economic forces are not likely to lead cable systems to carry all of the broadcast signals available off-the-air in their local communities and that the number of broadcast signals carried by cable systems operating in an unregulated environment is likely to be influenced by the availability of other program services. However, this study

does not provide any definitive information about cable signal carriage practices in the absence of must carry rule or the effects of such practices on cable subscribers' access to the available off-the-air broadcast signals.

133. In summary, we find that the current practices of consumers with respect to connecting their television sets to cable systems has led to the perception that cable operators have the ability to limit their subscribers' access to broadcast television signals. This misperception is inimical to the public interest in that it tends to frustrate our federal objectives of maximizing program choices and promoting a fair and open competitive market environment that will produce programming that meets viewers' interests and preferences. The rapidly evolving cable industry with its changing economic incentives makes it difficult to provide an accurate forecast of the effects of the signal carriage practices of cable systems in the absence of must carry rules on viewer access to program choices. What is clear, however, is that a substantial number of cable subscribers have not maintained independent off-the-air reception capability. As a result, many subscribers currently would not be able to view those broadcast signals not carried by cable systems. We also find that there is ample evidence that cable penetration nationwide has reached a level where there is potential for this problem to affect a substantial portion of the population.

134. Thus, we conclude that some form of regulation is necessary to correct these undesired effects of our former rules in order to prevent them from further hindering the achievement of our federal objectives concerning cable and broadcast television service. Such regulation must be designed to give viewers the capability to preserve and reestablish their independent access to the available off-the-air program choices and to promote a competitive industry structure that will foster the development of new program choices. In addition, any regulation must achieve these objectives in a manner that will be least intrusive on the

First Amendment rights of cable operators and cable programmers.

**TABLE 1**

**Growth of the Broadcast and Cable Industries**

| | 1972 | 1975 | 1979 | 1983 | 1986 |
|---|---|---|---|---|---|
| TV Households (millions) | 65 | 70 | 75 | 83 | 86 |
| Total TV Stations | 905 | 958 | 992 | 1095 | 1206 |
| Commercial TV Stations | 699 | 711 | 732 | 802 | 898 |
| Affiliates | 607 | 625 | 620 | 623 | 628 |
| VHF | 476 | 483 | 485 | 501 | 485 |
| UHF | 131 | 142 | 135 | 122 | 143 |
| Independents | 92 | 86 | 112 | 179 | 270 |
| VHF | 34 | 30 | 31 | 25 | 39 |
| UHF | 58 | 56 | 81 | 154 | 231 |
| Noncommercial TV Stations | 206 | 247 | 260 | 293 | 308 |
| VHF | 89 | 95 | 102 | 114 | 117 |
| UHF | 117 | 152 | 158 | 179 | 191 |
| Cable Television | | | | | |
| No. of Systems | 2841 | 3506 | 4150 | 4825 | 6844 |
| Homes Passed (millions) | 11 | 20 | 33 | 45 | 65 |
| Homes Passed (%) | 17 | 29 | 44 | 54 | 76 |
| Basic Subs. (millions) | 6 | 9.8 | 14 | 28 | 40 |
| Penetration (1%) | 9 | 14 | 19 | 34 | 47 |
| Pay Subs. (millions) | 0 | 0.5 | 5 | 23 | 22 |

*Sources:* Television Digest's *Television Factbook;* Broadcasting's *Yearbook;* Arbitron's *Markets and Rankings Guide; Cablevision,* April 11, 1983, at 69; *Cablevision,* February 10, 1986, at 56; *Television & Cable Factbook,* Handy Pocket Directory of Television Stations in Operation, March 1985; and *1986 Cablefile.*

Cable Television

## TABLE 2

### Cable Penetration By Market Rank

| Market Rankings | 1972 | 1976 | 1980 | 1984 |
|---|---|---|---|---|
| All Markets | 10.8 | 15.1 | 22.1 | 43.0 |
| 1 - 25 | 7.4 | 10.2 | 15.7 | 36.5 |
| 26 - 50 | 9.4 | 15.5 | 22.9 | 46.4 |
| 51 - 100 | 11.9 | 17.5 | 26.2 | 48.0 |
| 101 - 150 | 20.6 | 24.8 | 33.9 | 52.5 |
| 151 - end | 33.9 | 40.3 | 47.6 | 59.3 |
| 1 - 10 | 8.4 | 10.6 | 14.0 | 33.6 |
| 11 - 20 | 8.5 | 10.2 | 14.2 | 37.5 |
| 21 - 30 | 5.0 | 12.2 | 20.0 | 42.7 |
| 31 - 40 | 7.2 | 10.8 | 19.0 | 44.0 |
| 41 - 50 | 13.0 | 20.5 | 29.2 | 49.5 |
| 51 - 60 | 9.2 | 15.5 | 23.1 | 47.8 |
| 61 - 70 | 11.4 | 11.7 | 21.5 | 47.6 |
| 71 - 80 | 9.5 | 21.5 | 30.3 | 50.9 |
| 81 - 90 | 9.0 | 18.6 | 26.8 | 46.0 |
| 91 - 100 | 17.8 | 20.0 | 29.5 | 47.6 |
| 101 - 110 | 11.7 | 22.4 | 27.1 | 48.2 |
| 111 - 120 | 16.0 | 20.4 | 40.8 | 55.5 |
| 121 - 130 | 20.1 | 26.6 | 33.2 | 53.9 |
| 131 - 140 | 19.7 | 23.3 | 31.3 | 48.2 |
| 141 - 150 | 30.7 | 31.4 | 37.1 | 56.7 |
| 151 - 160 | 28.3 | 38.9 | 47.0 | 53.7 |
| 161 - 170 | 29.1 | 32.9 | 37.6 | 56.2 |
| 171 - 180 | 32.6 | 34.4 | 45.1 | 57.0 |
| 181 - 190 | 35.7 | 44.0 | 52.9 | 66.0 |
| 191 - 200 | 42.3 | 47.5 | 53.3 | 65.2 |
| 201 - end | 35.3 | 44.9 | 49.2 | 57.9 |

Sources: Arbitron's *1972 Television Market Analysis, Television Markets and Rankings Guide 1976 1977, 1980 1981 Television Markets and Rankings Guide,* and *1984 1985 ADI Market Guide.*

**TABLE 3**

| | Indoor Antennas | | Outdoor Antennas | |
|---|---|---|---|---|
| | Units | Dollars | Units | Dollars |
| | (thousand) | | (thousands) | |
| 1980 | 3,141 | 19,624 | 2,318 | 45,136 |
| 1981 | 3,405 | 21,751 | 2,218 | 44,597 |
| 1982 | 2,917 | 20,904 | 1,964 | 41,123 |
| 1983 | 2,319 | 15,596 | 1,945 | 41,768 |
| 1984 | 2,035 | 13,565 | 1,709 | 37,518 |

Source: EIA, *The Electronic Market Data Book*, 1981 through 1985 editions, Table 5-19 (data from "TV and FM Accessory Parts," Report No. MS429). "Indoor antenna" is defined as an antenna capable of receiving VHF, UHF or a combination of VHF and UHF television signals and not an integral part of a TV receiver. Such antenna is designed to mount on the top, back or side of a TV receiver. An "outdoor antenna" is defined in the same manner except that it is specified as designed for outdoor mounting.

**TABLE 4**

**Sales of Cable Compatible TV Sets**

| | Number of Color TV Units | Percent of Total TV Sales |
|---|---|---|
| 1981 | 3,896,534 | 33.1% |
| 1982 | 5,181,645 | 44.4 |
| 1983 | 6,568,843 | 45.9 |
| 1984 | 9,621,471 | 58.1 |

Source: EIA. *The Electronic Market Data Book*, 1985, Table 1-8, at 12.

**Policy Decision**

135. In view of the above, we have determined that the most appropriate course of action is to adopt a plan that will make cable subscribers aware of the need for the capability to access broadcast signals directly off-the-air and will actively assist the development of such capability. Such an approach is consistent with our general belief that market mechanisms are the preferred method for ensuring that the interests of consumers are satisfied. We also recognize that our former must carry rules have contributed to the creation of a distorted market environment which needs to be corrected before economic forces can be relied upon to achieve maximum diversity in program choices for the public. In view of the fact that most cable subscribers now are unaware of the need to receive broadcast signals off-the-air and are unprepared to do so, it is likely to take a considerable period of time to educate them with respect to the need for direct access to broadcast services and to allow them sufficient opportunity to acquire such capability or to make an informed choice that such a capability is not desired. Thus, we believe that in the short-term. It is necessary to adopt an approach that also will ensure that viewers continue to maintain access to broadcasting, so that it remains a competitive alternative source of programming even as consumers move toward an environment without must carry rules.

136. To implement this course of action, we have developed a two-part regulatory program which is designed first to alter existing practices and knowledge with respect to connection of cable service that can render cable subscribers unable to receive broadcast television service and, second, to provide interim must carry protection to the broadcast television industry during the transition to the new environment in which the connection of cable service no longer has that effect. Under the first part of our new

regulatory program, we will require cable systems to provide their subscribers with input selector switches that will enable reception of broadcast signals by means of an antenna. In addition, we will require cable systems to implement a consumer education program to inform their subscribers of the purpose, and need for, maintaining off-the-air reception capability after subscribing to cable. The second part of our program provides for interim must carry rules that will expire at the end of a five-year period. The transitional must carry rules we are adopting are comprised in large part of the terms of the industry agreement, with certain modifications to ensure that the rules maximize the public interest. The modifications to the industries' proposals include specific protections for noncommercial stations operating on reserved channels and new commercial stations and to maintain our existing nonduplication rules.

137. We believe a five-year transition period will provide sufficient time for consumers to become aware of the need for direct off-the-air access to broadcast signals and to acquire such capability if they so desire. Accordingly, the interim must carry rules and certain aspects of the input selector requirements as discussed below will expire on January 15, 1992. We plan to initiate and conclude a rule making proceeding sufficiently prior to this expiration date to determine whether there are particular situations where mandatory carriage rules might continue to be necessary.

138. We emphasize that it is out of an abundance of caution and concern for the significant governmental interest in maximizing diversity in consumers' program choices that we are imposing must carry rules until it can be assured that there has been sufficient opportunity for cable subscribers to reestablish independent access to broadcast service.[92] In this respect, we recognize must

[92] In this regard, the interim must carry regulations are not intended as a mechanism to extend signals beyond a station's service contour

carry rules are a stringent form of regulation that intrude on cable operators' free speech rights. Although we have found that consumers would have difficulty receiving off-the-air signals at present, the part of our regulatory plan pertaining to input selector switches and consumer education is expected to resolve this problem. Accordingly, we find no need or justification in this proceeding for imposing must carry requirements for more than a five year period. We conclude that must carry regulations are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast signals and, in fact, would impede our objective of maximizing program choices to viewers. While we have found that short-term must carry regulations are necessary in order to ensure that broadcasting remains a competitive alternative source of programming in the interim period, the record clearly supports no more extensive regulatory program than that which we are adopting. In this respect, the transitional rules are no broader or more extensive than necessary to provide an orderly shift to a less regulated environment. The interim must carry rules are considerably narrower in scope than those vacated in *Quincy* and are specifically tailored to the need for regulation. Thus, we believe they meet the constitutional concerns expressed by the court. We note that the interim rules are less intrusive on cable operators' editorial discretion than the former rules in that they will apply only for a specific limited period of time.

139. We are confident that, in the long run, this plan will ensure viewers' access to broadcast signals off-the-air and, thus, the greatest viewer choice should be maintained. However, in order to achieve the policy objectives we have set forth herein, it is essential that all of the major features of this program, in particular, the input selector

---

or into areas where the signal would not otherwise be available off-the-air.

switch, education program, and interim rules with firm expiration date, be implemented! If any of these articulated elements were to be deleted? the remaining portions of the program might not be sufficient to achieve our objectives.

### Description of the New Rules

## I. Input Selector Switch Rules

140. The new rules for developing and maintaining the capability of cable subscribers to receive broadcast signals off-the-air require that cable operators offer to install an input selector switch for use with an antenna at no additional cost for all new cable subscribers, Thereby leaving the subscriber in the same position to receive off-the-air signals as before cable installation.[93] This is a continuing requirement that will not expire at the end of the transition period. The new rules also require cable operators to offer existing subscribers an input selector switch at no cost, by providing all such subscribers with a form that is to be returned by those who desire a switch. On that form, an existing subscriber will select the option of either receiving the switch with self-installation instructions or, alternately, requesting that the cable operator install the switch, in which case the subscriber can be charged reasonable labor costs. This offer shall be made by the cable operator in writing within six months of the effective date of this *Order* and on an annual basis thereafter for five years. There is no continuing requirement for cable operators to offer input selector switches to existing subscribers after the conclusion of the five-year transition period. In other respects, the rules concerning input selector switches apply identically to both existing and new subscribers. First, the switch must be provided to all cable subscribers, whether or not the cable system carries all

---

[93] *See* Appendix B.

local television broadcast signals.[94] Second, as described in further detail below, the operator must provide information to the subscriber concerning the function of the switch. Third, in all instances, cable operators must offer to supply and install an input selector switch for each separate television set to which the cable is connected.[95] Fourth, cable operators will be required to inform subscribers that an antenna may be needed to receive television broadcast signals. Fifth, cable operators will not be permitted to suggest or recommend that subscribers dismantle their antennas.

141. In addition, the new rules will impose a continuing requirement for cable systems to inform subscribers of the changes in the regulations concerning carriage of broadcast signals and of the need for input selector switches. These rules will require cable operators to inform their subscribers annually that not all signals are required to be carried; that after January 15, 1992, no signals might be carried; and thus that it may be necessary to use an antenna in conjunction with an input selector switch to receive available off-the-air broadcast stations not carried on the cable systems. In addition, cable operators must include a description of the function of an input selector switch and that its purpose is to aid the viewer in preserving independent access to off-the-air television service. Cable operators must also inform the subscribers which local broadcast signals are not at that time carried by the cable system. The information must state further that the input selector switch will assist subscribers in receiving those local stations available off-the-air that may not be

---

[94] In cases where the cable subscriber has an equivalent input selector device, for example through a former purchase or as a built-in feature of his/her television receiver, the cable system will not be required to provide another switch.

[95] This requirement is subject to the above exception for cases where subscribers are already equipped with input selector switches.

carried on the system. This consumer education information must be provided to new subscribers at the time of installation of cable service and to existing subscribers that do not have input selector switches within six months after the effective date of this *Order* and Thereafter on an annual basis. The annual requirement may be satisfied by including the information with the annual input selector switch offering, in monthly subscriber billings or other mailings.

142. With respect to the technical performance characteristics of input selector switches, we recognize that there is potential for signals from the cable system to leak into the antenna input terminal if the two signal paths in a switch are not sufficiently isolated. Such undesired signal leakage would be radiated through the antenna and could cause significant interference to licensed radio services and to the operation of other radio frequency devices. In order to prevent such possible interference, all input selector devices installed to provide switching between a cable television system and an antenna for reception of off-the-air broadcast television signals will be required to comply with the technical standards of §15.606(a) of the rules.

## II. Interim Must Carry Rules

143. Under the transitional signal carriage rules we are adopting, cable systems will be required, subject to various conditions, to devote a limited portion of their capacity to carriage of qualified broadcast television signals. A cable system's mandatory carriage obligations under the revised rules will vary according to the number of usable activated channels available on the cable system. "Usable activated channels" are defined as those channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, less channels reserved against interference with aeronautical frequencies. This definition is the same as that specified in the Cable Act for other areas of cable regu-

lation.[96] Broadcast stations will qualify for carriage under these rules on the basis of several criteria. Any station not qualifying for must carry status may be carried at the cable operator's discretion. However, carriage of such stations will not count towards meeting a cable system's signal carriage obligations under the interim rules.

144. *Qualified Broadcast Stations.* All domestic fullservice broadcast stations will be eligible to qualify for carriage under these rules. Noncommercial educational translators operating at 100 watts or more of power and located in the cable community will also be eligible to qualify for carriage. Broadcast stations licensed by foreign governments, satellite stations, low power television stations, commercial translators, and subscription television stations are not entitled to carriage under the new rules.[97] To qualify for carriage, a commercial or noncommercial broadcast station must be licensed to a community that is within 50 miles of the cable community, as measured from the principal cable headend to the reference point of the station's city of license as defined in Section 76.53 of our rules.[98] In the case of cable systems with multiple headend facilities, the cable operator shall specify which such facility is the principal headend.

145. Commercial broadcast stations also must meet a viewing standard to qualify for mandatory carriage on a cable system. To meet this standard a commercial station must demonstrate that it attains at least an average share of total viewing hours of 2 percent and a net weekly

---

[96] *See* 47 U.S.C. §532(b)(5)(A).

[97] Cable carriage of these outlets and any other broadcast stations that do not qualify for carriage under these rules will continue to be permitted at the discretion of the cable operator but will not count towards meeting a cable system's mandatory signal carriage obligations.

[98] *See* 47 CFR §76.53. We also note that there will be no special provisions in the interim must carry rules for hyphenated markets, as defined in Section 76.51 of our rules. *See* 47 CFR §76.51.

circulation of 5 percent in noncable households in the county where the cable system is located.[99] However, a new commercial station will be exempt from demonstrating that it meets this viewing standard for its first 12 months of operation.[100] Additionally, stations that have commenced operation after July 19, 1985, the effective date of the suspension of the former must carry rules, and stations that have commenced operation since that time will not be subject to the viewing standard for one full year from the effective date of the interim rules. Also, no viewing standard will apply to otherwise eligible noncommercial educational stations or translators operating on reserved channels.

146. A commercial broadcast station shall demonstrate that its audience during the required survey period meets the viewing standard on the basis of independent professional audience surveys conducted according to recognized statistical methodology. Audience surveys must be based on her viewing of the subject station in noncable homes in the county where the cable system is located. If the cable system serves homes in more than one county, the appropriate measure will be for the county in which the plurality of subscribers reside. In cases where the generally accepted practice for audience measurement is to report

---

[99] "Share of total viewing hours" means the total hours that noncable television households viewed the subject station during the week, expressed as a percentage of the total hours these households viewed all stations during the period, and "net weekly circulation" means the number of noncable television households that viewed the station for 5 minutes or more during the entire week, expressed as a percentage of the total noncable television households in the survey area. These definitions are consistent with those used for determining whether a station is significantly viewed. *See* 47 CFR §76.5(k).

[100] A station's one year exemption from the viewing standard will begin on the date it begins operation under program test authority (PTA). Also, stations that have gone off-the-air and come back on at some time after the first calendar year from their initial commencement of operation will not qualify as new stations for purposes of these rules.

statistics on a split county or independent city basis, these areas will be acceptable as the appropriate geographic unit for the audience survey.[101]

147. Stations that have been on the air for more than one television survey season will qualify for carriage upon showing that they met the viewing standard during the previous Television survey season, television survey season will be defined as the period between April 1 of one year and March 31 of the following year. The showing must be based on four 4-week survey periods, with at least one survey period in each of the 4 quarters of the television survey season (i.e., April-June, July-September, October-December and January-March). The survey methodology must be comparable to that of surveys conducted to demonstrate significantly viewed status pursuant to Appendix B of the *Memorandum Opinion and Order on Reconsideration of Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326 (1972).[102] To the extent that the regularly published reports of the major audience rating services (e.g., Arbitron and A.C. Nielsen) meet these criteria, they may be used to satisfy these requirements. However, a showing that a station meets the viewing standard for a qualified station may be based on audience surveys conducted by any independent professional survey organization.

148. Commercial stations that have been operational for less than a full television survey season, except new sta-

---

[101] The rating services occasionally split large counties where there are viewing differences from one part of county to another. Also some cities that are not located in counties are reported separately. Where a station qualifies for carriage based on surveys for a geographic unit other than an entire county, its carriage rights will be limited accordingly.

[102] *See* §76.54(d). The principal difference between the surveys required here and those used to determine significant viewing status is that must carry qualification will be based on four 4-week survey periods instead of three 4-week audience periods.

tions that have been on-the-air less than 12 months, may demonstrate that they meet the viewing standard for qualifying for must carry status on the basis of a special study conducted by an independent professional surveying firm.[103] The study must demonstrate that the subject station meets the viewing standard on the basis of audience surveys covering a period of at least two weeks.[104] The survey must be based only on viewing in noncable homes in the county where the cable system is located. In this respect, we believe it is more appropriate To define qualified signals in terms of those actually available off-the-air and that the viewing patterns of noncable households are likely to provide better indicators of such signals than the alternative approach proposed by Senator Danforth. In order for the Sample to be representative of the viewing in the cable system's country, the distribution of the noncable homes sampled for this showing must be proportional to the noncable population distribution of the appropriate county. The level of viewing in the sample households may be measured using any recognized surveying technique (i.e., diary, telephone, or meter). Further, the sample size shall be sufficient to assure that the average audience statistics reported are at least one standard error above the required viewing level for a qualified station.

149. Additionally, in order to qualify for must carry status a television broadcast station must deliver a "good quality" signal to the principal cable headend. The standard we are adopting requires that such signal equal or exceed a high picture quality in which interference may

---

[103] We note that it is possible for a new station to have been on-the-air more than 12 months and less than one complete television survey season.

[104] The required survey is similar to that prescribed in Section 76.54(b) for determining whether a station is significantly viewed. The two procedures differ in that a survey for qualifying for must carry status is a county based, rather than a community based study, and there are no limits on the choice of two-week survey period.

be just perceptible.[105] Because a station's signal is processed at several points throughout a cable system, we believe this level of quality at the headend is necessary to provide enjoyable viewing to cable subscribers. The subjective nature of this standard generally would require that systems carry signals of qualified television broadcast stations that provide a minimum signal level of -45 dBm for UHF signals and -49 dBm for VHF signals at the input terminals of the signal processor at the principal cable headend.[106] In general, these levels would be needed to achieve the above picture quality.[107] We recognize that in some instances cable systems currently may not have equipment capable of receiving broadcast signals of the required quality. In such circumstances, a broadcaster would be permitted to furnish any equipment or to compensate a cable operator for equipment necessary to upgrade existing reception capability or to provide direct feed of baseband signals. Broadcast stations also will be permitted to deliver their baseband video/audio signal directly to cable systems via alternative means such as a landline or microwave faciiity.

150. *Signal Carriage Obligations.* The number of qualified broadcast stations a cable system must carry is determined by its number of usable activated channels. Cable television systems with 20 or less usable activated channels only will be required to carry one qualified noncommercial

---

[105] This definition is generally comparable to a level 2 grade signal as rated by the TASO Committee. *See* Report of the Television Allocations Study Organization, *Engineering Aspects of Television Allocations.* March 16, 1959, at 448, 453. *See also* Gordon L. Fredendall and William L. Behrend, "Picture Quality—Procedures for Evaluating subjective Effects of Interference," *Proceedings of the IRE.* Vol. 48, No. 6, at 1030-1034.

[106] These values may be considered comparable to the level 2 TASO picture quality standard.

[107] We are not establishing a specific technical requirement to permit greater flexibility among the parties to determine good picture quality.

(1979). Thus, the Knight intervenors are barred from seeking this injunction against the state Board under Section 1983.

However, in an injunctive or declaratory action[9] grounded on federal law, parties may overcome the state's immunity by naming state officials as defendants. *Graham, supra*, 105 S.Ct. at 3107 n. 18. The intervenors' motion for a preliminary injunction satisfied this requirement by seeking to enjoin "the Alabama State Board of Education *and its members*, from failing to approve teacher training programs at Alabama State University [emphasis added]." The motion did not specify whether the intervenors sued these Board members in their official or personal capacities. Although we do not encourage such omissions, the Supreme Court has indicated that "[t]he course of proceedings will typically indicate the nature of the liability sought to be imposed." *Id.* 105 S.Ct. at 3106 n. 14; *Brandon v. Holt*, 469 U.S. 464, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985).

We think it clear that in this case the intervenors sought to enjoin Board members in their official capacities as state officers. The Board members' decision not to approve the teacher education programs at issue was an official action consonant with their view of official duty, not one undertaken by individuals acting independently of their offices. Thus, an act representing the execution of government policy inflicted the injury in this case and may be enjoined

---

[9] The intervenors' motion for a preliminary injunction against a state entity, of course, is not identical to an action for injunctive relief against such a body. In the latter case, the act to be enjoined is the alleged violation of federal law sued upon. In the former situation, however, the injunction may issue against an act that is not itself alleged to be a violation of law, but one that will instead disturb the status quo sufficiently to make a remedy for the violation of law doubtful. We assume, despite this distinction, that the Young exception applies similarly in both cases.

despite the Eleventh Amendment bar. *See Monell, supra,* 436 U.S. at 694, 98 S.Ct. at 2037.

Since we determine that the Eleventh Amendment permits the Knight intervenors to secure an injunction against state Board members under Section 1983 and the *Young* exception, we need not reach the difficult question of whether the Board could properly be enjoined under Title VI. We turn finally to a review of the injunction itself.

## III

An injunction may be reversed on appeal only for abuse of discretion by the district court. *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir.1983). The Board maintains that it was prejudiced by insufficient notice and the "sudden" conversion by the district court of what was originally a temporary restraining order (TRO) proceeding into a preliminary injunction hearing.

The sufficiency of notice prior to the issuance of a preliminary injunction is a matter left within the discretion of the trial court. *Corrigan Dispatch Co. v. Casa Guzman,* 569 F.2d 300, 302 (5th Cir.1978). In this case, the district court had no opportunity to exercise its discretion by ruling on the question of whether notice was sufficient, since appellant did not appear to object, seek a continuance, or in any other way protest the scheduling of the preliminary injunction hearing. This Court generally will decline to review issues not raised in the district court. *Harris Corp. v. National Iranian Radio,* 691 F.2d 1344, 1353 (11th Cir.1982).

In any event, we are not persuaded on the merits that the one to three days' written notice (depending on which version is accurate) that appellant received of appellees' motions for injunctive relief was insufficient. Fed.R.Civ.P. 65(a), which governs notice in such cases, provides only that notice must be given; it does not specify how much notice is necessary. As appellant suggests, *Granny Goose*

*Foods, Inc. v. Teamsters*, 415 U.S. 423, 434 n. 7, 94 S.Ct. 1113, 1121 n. 7, 39 L.Ed.2d 435 (1974), does indicate that "[t]he notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." (In *Granny Goose*, the defendant received only same-day informal notice of the hearing by telephone.) But appellant here does not demonstrate persuasively that it was prejudiced by short notice, nor does it show how its argument would have been materially different with more warning. A district court is not at leisure to permit those against whom injunctions are sought to sharpen their arguments indefinitely.

Appellant's argument that the lower court erred in converting what was originally a temporary restraining order hearing into a preliminary injunction proceeding is similarly unavailing. Again, the Board failed to complain of the alleged error to the district court. Further, since a TRO and a preliminary injunction are somewhat similar, it is not uncommon to find that the two have not been properly distinguished. *See, e.g., Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir.1982). The former Fifth Circuit has indicated that "[w]here the opposing party has notice of the application for the temporary restraining order, such order does not differ functionally from a preliminary injunction. *Dilworth v. Riner*, 343 F.2d 226, 229 (5th Cir.1965). In short, we cannot conclude that the conversion of a TRO hearing to a preliminary injunction hearing—particularly in the case at bar, in which appellees' motions in one way or another mentioned a preliminary injunction as well as a TRO—is so radical a procedure that it is presumptively an abuse of discretion. With no showing of actual prejudice to appellant from the conversion, we must decline to hold the district court in error.

Finally, we turn to the Board's argument that appellees failed to meet their burden of establishing a substantial

likelihood that they would prevail on the merits of the controversy.[10] Specifically, appellant challenges findings made by the district court: (1) that the Board's failure to approve ASU programs was discriminatory and retaliatory, and (2) that the faculty experience requirement for approval of teacher education programs challenged by ASU in the severed action was potentially discriminatory.

We agree that the latter finding cannot support injunctive relief since the likelihood of success on "the merits" considered there solely involves the merits of ASU's severed claims, and we have concluded that ASU has no standing to bring such claims. Further, we regard the finding of retaliatory motive by the Board as simply immaterial to the question of whether a preliminary injunction should issue, since a plaintiff in seeking such an injunction is not asked to establish, among the four factors, anything at all about the motive for the enjoined act.

Nevertheless, we hold that the trial court's entry of the preliminary injunction sought by the Knight intervenors against the Board was entirely appropriate. The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *Corrigan Dispatch, supra*, 569 F.2d at 302. *See also University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1980). Preliminary injunctive relief may be necessary to insure that a remedy will be available. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir.1984), *cert.*

---

[10] To secure a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood that the plaintiff will prevail on the merits, (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the harm to the defendant, and (4) that the grant of an injunction will not disserve the public interest. *Johnson v. United States Department of Agriculture*, 734 F.2d 774, 781 (11th Cir.1984). Before this Court appellant disputes only the lower court's conclusions on the first point.

*denied sub nom. Windrush Partners v. Metro Fair Housing Services*, ___ U.S. ___, 105 S.Ct. 249, 83 L.Ed.2d 187 (1984). We accept as unchallenged the district court's factual conclusion that:

> [t]he total effect of the Board's non-approval of most of ASU's teacher education programs if left unredressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meantime, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited institution, both to black and prospective white students, will be nonexistent.[11]

Given this finding by the lower court, which is entitled to substantial deference, see *Anderson v. City of Bessemer*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), it is clear that even the partial demise of ASU would impede the ability of the trial court—and this Court on review—to remedy any violation of law proved in the state-wide action originally brought by the United States and joined by the Knight intervenors. The trial judge was evidently persuaded that the intervenors had a substantial likelihood of success on the merits in the latter action, particularly since the judge, who had heard argument in the state-wide case when the injunction was entered, later held in the plaintiffs' favor. Although we do not intimate anything with respect to this Court's ultimate holding on the merits,

---

[11] The Board at most argues that any harm to ASU resulting from the action of the former was self-inflicted—that is, that ASU provoked disapproval of its programs by its "blatantly defiant attitude toward regulations duly adopted by the State Board of Education." Whether the Board was justified in its decision not to recertify the programs at issue is again immaterial here. We simply conclude that the Board's decision, if it is not enjoined, will render a remedy in the main action meaningless.

we are satisfied that the Knight intervenors made out a case sufficient to support a preliminary injunction.

Accordingly, we AFFIRM the court's entry of this injunction, on behalf of the intervenors, against the members of the state Board in their official capacities. We REVERSE the district court's entry of any injunction on behalf of ASU, or against the state Board itself.

ALLGOOD, Senior District Judge, concurring specially:

I concur in the judgment of the court, and add the following:

No matter how artfully phrased, demands by predominately black universities, or by persons attempting to assert their interests, which draw their students, faculty and staff from predominately white market areas, for preferential treatment or status as vicarious victims of prior discrimination, presuppose that such universities have some legally protectable interest in remaining predominately black, and that the predominately black university must be one of the mechanisms through which prior unlawful racial separation and its vestiges are corrected. State created institutions have no such right, and the State is not limited in that way. It may well be that problems with the quality of some public educational institutions are so pervasive and ingrained that black students will be hurt, not helped by the perpetuation of those institutions.

This case could go a long way toward deciding the future of the university system in this State.

If, under appropriate standards and legal principles, liability of the State of Alabama, or any of its institutions is upheld, an issue not before us on this appeal, the District Court will be charged with approving an appropriate remedy, giving due deference to suggestions made by state authorities. *See generally Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971). If, in that event, in sub-

mitting a plan the State concludes that the most effective, educationally sound, and least expensive manner to remedy a violation is to close some colleges, or to merge them under the boards of the State flagship institutions, I see no constitutional or statutory barriers to that being done. *Cf. Ayers v. U.S.*, 769 F.2d 311 (5th Cir.1985). However, that question must be left for another day. In the meantime, all parties to this expensive suit have a duty to and should strive for a negotiated solution to it.

## APPENDIX E

## UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

**No. 86-7090**

**D.C. Docket No. 83-1676**

---

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

JOHN F. KNIGHT, JR., et al., individually and on behalf of others similarly situated,
*Plaintiffs-Intervenors, Appellees*
v.

THE STATE OF ALABAMA, GEORGE C. WALLACE, Governor of the State of Alabama; and THE ALBAMA PUBLIC SCHOOL and COLLEGE AUTHORITY; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; AUBURN UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation,
*Defendants-Appellants,*

JACKSONVILLE STATE UNIVERSITY etc., et al.,
*Defendants.*

---

**On Appeal From the United States District Court for the Northern District of Alabama**

---

[Filed October 6, 1987]
[Issued as Mandate November 2, 1987]

## JUDGMENT

Before VANCE and KRAVITCH, Circuit Judges, and BROWN*, Senior Circuit Judge.

This case came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that appellee pay to appellants, the cost on appeal to be taxed by the Clerk of this Court.

---

* Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

## APPENDIX F

**Supreme Court of the United States**

**A-506**

---

JOHN KNIGHT, et al.,

*Applicants,*

v.

AUBURN UNIVERSITY, et al.,

---

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

---

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entered cause be, and the same is hereby, extended to and including January 19, 1988.

/s/ JOHN PAUL STEVENS
Associate Justice of the Supreme
Court of the United States

Date this 29th
day of December, 1987.

## APPENDIX G

## ARTICLE VI

### Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding.

## APPENDIX H

## AMENDMENT XIV

**Section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## APPENDIX I

### §455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party or the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interest of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization

only if the outcome of the proceeding could substantially affect the value of the interest;
(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.